Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

M.C. KRAMER, Warden, *Petitioner*,

v.

DWAYNE DAVIS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

People v. Wende, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979) applied *Anders v. California*, 386 U.S. 738 (1967), in which this Court held that appointed criminal appellate counsel seeking to withdraw from a frivolous appeal must file a brief referring to anything in the record that might arguably support the appeal. *Wende* approved no-merit briefs that include a statement of the procedural and historical facts but no specification of frivolous legal issues and held that the state court of appeal must independently review the record in such cases for error. Approximately 1,500 criminal appeals a year are processed under *Wende*. The questions presented are:

1. Is the form of no-merit brief approved in *Wende* contrary to or an unreasonable application of *Anders*?

2. Is a habeas petitioner who claims ineffective assistance of counsel because his appellate counsel filed a *Wende* brief required to show prejudice?

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

M.C. KRAMER, Warden, *Petitioner*,

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DWAYNE DAVIS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

M.C. Kramer ("the Warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed the district court's grant of a writ of habeas corpus vacating the conviction of Respondent Dwayne Davis ("Davis") unless he was afforded a new state appeal.

OPINIONS BELOW

Judge Reinhardt's opinion for the Ninth Circuit Court of Appeals, App. 1a-17a, is reported at ___ F.3d ___, 1999 WL 27487 (CA9 1999). The opinion of the district court, App. 18a-36a, is not reported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on January 26, 1999. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. IV.

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

In 1994, Davis was convicted and sentenced to prison after a jury found him guilty of first degree burglary and the court found that he had a prior serious felony conviction.

On direct appeal, Davis' attorney filed a brief pursuant to *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979), App. 41a-47a, and Davis filed a supplemental brief. The court of appeals independently reviewed the record, discussed the claims in appellant's supplemental brief, and affirmed, concluding, "Appellant was represented by competent counsel and received a fair hearing. There are no meritorious issues to be argued." App. 40a. The California Supreme Court denied review.

In March 1996, Davis filed in the California Supreme Court a petition for a writ of habeas corpus claiming ineffective assistance of appellate counsel. The court summarily denied the petition in May 1996. CR 8, Ex. 6; ER at 53-73.

In December 1996, Davis filed a petition for a writ of habeas corpus in the United States District Court pursuant to 28 U.S.C. § 2254. The petition, as subsequently amended, alleged six constitutional shortcomings, one of which was that appellate counsel was ineffective for filing a *Wende* brief. ER at 91-99.

In March 1998, the district court concluded that Petitioner was not entitled to relief on any of the claims except for the claim of ineffective assistance of appellate counsel. The court ordered Davis' conviction vacated unless the State allowed him to take a delayed appeal. App. 35a.

The Warden appealed and obtained a stay from the court of appeals.

On January 26, 1999, the court of appeals affirmed the order granting the petition based on ineffective assistance of appellate counsel.

Relying on its pre-AEDPA opinion in *Robbins v. Smith*, 152 F.3d 1062 (CA9 1998), *petition for cert. filed*, No. 98-1037, the Ninth Circuit held that the state court's rejection of Davis' claim of ineffective assistance of appellate counsel was, under 28 U.S.C. § 2254(d)(1),

"contrary to *Anders*." The court reasoned, "As *Robbins* makes clear, *Anders* clearly establishes that a no-merit brief such as the one filed by Davis' appellate attorney does not satisfy federal constitutional standards." App. 8a. In particular, the court opined that because a *Wende* brief does not "'identify any grounds that arguably support an appeal,'" the clearly established requirements of *Anders* had not been met. App. 7a-8a.

The court also held under 28 U.S.C. § 2254(d)(1) that requiring Davis to show prejudice from the filing of the *Wende* brief would be an unreasonable application of *Penson v. Ohio*, 488 U.S. 75 (1988). App. 11a.

REASONS FOR GRANTING THE WRIT

A. Introduction

The Court of Appeals for the Ninth Circuit (Reinhardt, J., joined by Noonan and Hawkins, J.J.) has invalidated California's nearly 20-year-old procedure for handling the more than 1,500[1] no-merit indigent criminal appeals that are disposed of annually. In doing so, it has disagreed with the California Supreme Court on an important question of federal law, misapplied the limitations Congress imposed on federal habeas courts, and created the potential for significant disruption in the

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1. In fiscal year 1996-1997, the California Courts of Appeal filed opinions in 7,774 criminal and juvenile appeals. 1998 Annual Statistical Report of the Judicial Council of California at 26. Assuming that the previously identified percentages of no-merit briefs from two of the State's six appellate districts (20 percent and 24 percent, *People v. Hackett*, 36 Cal. App. 4th 1297, 1304 n.4, 43 Cal. Rptr. 2d 219, 224 n.4 (1995)) are representative and relatively constant, statewide more than 1,500 no-merit cases were resolved that fiscal year.

State's appellate courts by announcing a rule that will require new appeals for defendants whose convictions are final. Its decision engenders uncertainty about how to process pending appeals and places the validity of the State's appellate process in doubt by inviting a parade of habeas petitions claiming that the State still has not adequately complied with *Anders v. California*, 386 U.S. 738 (1967), as interpreted by the circuit.

The State argued against the procedures adopted by the California Supreme Court, *see, e.g.*, *People v. Wende*, 25 Cal. 3d 436, 442, 600 P.2d 1071, 1075, 158 Cal. Rptr. 839, 843 (1979), but it has for nearly twenty years relied on that court's reasoned judgment, which was unchallenged by the federal courts until *Robbins v. Smith*, 152 F.3d 1062 (CA9 1998). Under the AEDPA, the question no longer is who was right in *Wende*, the People or the state supreme court, or even whether the Ninth Circuit was right in *Robbins*. The primary issue is whether *Wende* is contrary to or an unreasonable application of *Anders* and its progeny. It is not. Indeed, the state court's rejection of Davis' *Wende* claim is the embodiment of that which AEDPA was designed to protect — reasonable interpretations of this Court's opinions by state courts.[2/]

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2. In *Delgado v. Lewis*, ___ F.3d ___, 1999 WL 86688 (CA9 1999), the Ninth Circuit applied its opinions in *Robbins* and the instant case, concluded that "AEDPA does not preclude the district court's application of *Anders* to invalidate California's no-merit brief procedure approved in" *Wende*, and reiterated that a habeas petitioner need not show prejudice from the filing of a *Wende* brief.

B. The Ninth Circuit Created a Significant Split of Authority by Disagreeing with the California Supreme Court and Failing to Properly Apply the Limitations of § 2254(d)(1)

In *Anders*, 386 U.S. 738, the Court "established a prophylactic framework," *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), "designed to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability." *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 439 (1988). To that end, when counsel concludes that an appeal is frivolous, that is to say, "lacks any basis in law or fact," *id.* at 439 n.10, and therefore that she is "under an ethical obligation to refuse to prosecute" the appeal, *id.* at 436, she may seek to withdraw and file not an advocate's brief but a brief that will "enable the court to decide whether the appeal is so frivolous that the defendant has no federal right to have counsel present his or her case to the court." *Id.* at 440 n.13. *Anders* held that the defendant may not be denied that right "based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Penson v. Ohio*, 488 U.S. 75, 80 (1988). Instead, the attorney is to file "a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744.

The California Supreme Court applied *Anders* in *Wende*. There, counsel "filed a brief which set forth a summary of the proceedings and facts with citations to the transcript, raised no specific issues, and called upon the court to make a thorough review of the entire record to determine for itself whether there were any arguable issues. Counsel also submitted a declaration stating that he had advised defendant of the nature of the brief, that he would send defendant a copy of the brief, and that he had informed defendant that the court would permit him

to file a brief on his own behalf. Counsel also stated that he was not requesting to withdraw but that he would advise defendant that he could move to have counsel relieved if he so desired." 25 Cal. 3d at 438, 600 P.2d at 1072, 158 Cal. Rptr. at 840. The court concluded *Anders* required it to "conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous" and rejected the People's "assert[ion] that the approach taken by counsel in the opening brief did not satisfy the standards set forth in *Anders*." *Id.* at 441-42, 600 P.2d at 1074-75, 158 Cal. Rptr. at 842-43.

In holding that *Wende* was contrary to *Anders* because the *Wende* brief does not "'identify any grounds that arguably support an appeal,'" App. 7a-8a, the Ninth Circuit has created a significant split of authority on the important federal question of the duties of appointed counsel. Had the Ninth Circuit properly applied the AEDPA, this split could have been avoided.

The Ninth Circuit erred when it applied the "contrary to" prong of 28 U.S.C. § 2254(d)(1) instead of the "unreasonable application" prong. Elsewhere in its opinion, the court stated that the "contrary to" test applies when "a Supreme court decision clearly establishes a rule that is dispositive of the petitioner's claim, in a factual context that is indistinguishable from — albeit not necessarily identical to — that presented by petitioner's case." The factual context presented by the *Wende* brief filed in Davis' direct appeal is distinguishable from the no-merit letter submitted in *Anders*. In *Anders*, counsel submitted a three paragraph letter that told the court there was no merit to the appeal but provided no information about the facts and procedural history of the case, other than the fact that Anders had been convicted of possession of narcotics. Davis' *Wende* brief contained not a bare assertion that the appeal was frivolous but an extensive statement of the procedural and historical facts.

Compare Penson, 488 U.S. at 81 n.3 (quoting the no-merit letter in *Anders*) *with* App. 41a-47a (Davis' *Wende* brief). The Ninth Circuit failed to recognize that a *Wende* brief is a very different type of submission than the *Anders* no-merit letter, a difference that required testing under the "unreasonable application" prong of § 2254(d)(1).

But even if evaluated under the "contrary to" prong of the AEDPA, *Wende*, and by extension a *Wende* brief, fully complies with this Court's precedents. By summarizing the factual and procedural history of the case, a *Wende* brief "draw[s] attention to 'anything in the record that might arguably support the appeal'" and "serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson*, 488 U.S. at 81-82 (footnote omitted).

The brief filed by Davis' attorney on direct appeal demonstrates this point. Among other things, counsel discussed the evidence, noted that the trial court had denied a motion to examine a police officer, quoted a comment during closing by the district attorney about never hearing any more evidence, and referred to the trial court's rejection of an instruction on a lesser offense. App 42a-45a. In affirming, the state court of appeal concluded that substantial evidence supported the verdict, the motion to call the officer was properly denied, no lesser instruction was required, and the prosecutor's comments did not violate *Griffin v. California*, 380 U.S. 609 (1965). App. 38a-40a. Thus, the foundation for the issues addressed by the court was established by the *Wende* brief, in accord with the goals and principles of *Anders* and *Penson*.

The Ninth Circuit divined in *Anders* an obligation to identify issues and found *Wende*'s omission of such an obligation fatally defective. But the California Supreme

Court's conclusion that *Anders* does not obligate counsel to identify issues is not contrary to or an unreasonable application of this Court's opinions, which dictate record, not issue, references. *Anders*, 386 U.S. at 744 (stating that counsel must file "a brief referring to anything in *the record* that might arguably support the appeal" (italics added)); *McCoy*, 486 U.S. at 430 (describing *Anders* as holding "counsel could not withdraw by simply advising the court of his or her conclusion, but must include with the request to withdraw 'a brief referring to anything in the record that might arguably support the appeal'"); *Penson*, 488 U.S. at 80 (stating that under *Anders* a motion to withdraw must "'be accompanied by a brief referring to anything in the record that might arguably support the appeal'"); *id.* at 82 & n.5 (noting that failure to file a brief "deprived the court of the assistance of an advocate in its own review of the cold record on appeal" and that "[o]ne hurdle faced by an appellate court in reviewing a record on appeal without the assistance of counsel is that the record may not accurately and unambiguously reflect all that occurred at the trial. Presumably, appellate counsel may contact the trial attorney to discuss the case and may thus, in arguing the appeal, shed additional light on the proceedings below. The court, of course, is not in the position to conduct such *ex parte* communications."). As the Supreme Court of Pennsylvania observed, "The major thrust of *Anders* was to assure a careful assessment of any available claims that an indigent appellant might have. That end is achieved by requiring counsel to conduct an exhaustive examination of the record and by also placing the responsibility on the reviewing court to make an independent determination of the merit of the appeal." *Commonwealth v. McClendon*, 495 Pa. 467, 473, 434 A.2d 1185, 1188 (1981).

California's supreme court is not alone in interpreting *Anders* as not requiring a specification of issues. After noting the obligation to refer to anything in

the record that might arguably support an appeal, Oregon's supreme court said, "We do not believe that the ethical relationship of Oregon counsel to client or court is furthered at all by compelling counsel to spell out the potentially limitless variety of 'arguably supportive' issues that counsel can fabricate or discern." *State v. Balfour*, 311 Or. 434, 450, 814 P.2d 1069, 1079 (1991). The court concluded that counsel confronted with a frivolous appeal should file a brief "divided into two sections, Section A and Section B. Section A of the appellant's brief shall contain a statement of the case, including a statement of facts, sufficient to apprise the court of the jurisdictional basis for the appeal. Section A, under those circumstances, *shall contain no assignments of error or argument*." *Id.* at 451, 814 P.2d at 1080 (citation omitted, italics added). "Section B . . . shall raise any claim of error requested by the client" but is not signed by the attorney. *Id.* at 452, 814 P.2d at 1080.

The procedure of the Arizona Court of Appeals "does not require appointed counsel to allege arguable issues if counsel determines none exists." *State v. Clark*, ___ Ariz. ___, ___, ___ P.2d ___, ___, 1999 WL 16739, *1 (Ariz. Ct. App. 1999). The procedures are very similar if not identical to those established in *Wende*, including an opportunity for the defendant to file a brief and independent review of the record. *Id.* at ___, ___ P.2d at ___, 1999 WL 16739, *8.

In any given case, a creative lawyer could hypothesize a wide variety of frivolous issues ranging from challenging each piece of evidence presented over objection to claims of ineffective assistance of counsel for not objecting to the remainder of the evidence. It is neither contrary to nor an unreasonable application of *Anders* to conclude that such information is not necessary to assist the court "in determining both that counsel in fact conduct the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided

without an adversary presentation." *Penson*, 488 U.S. at 81-82. That assistance comes from a brief referring to the record, which, thanks to appellate counsel's efforts, is no longer "'cold'" and is more likely to be accurate. *Penson*, 488 U.S. at 82 & n.5.

This analysis, ignored when offered by the Warden below, was advanced by the Arizona Court of Appeals in *Clark*. The court specifically disagreed with the Ninth Circuit's analysis in *Robbins*, further aggravating the split of authority. *Clark* explained that "[b]y requiring counsel to file an *Anders* brief setting forth a detailed factual and procedural history of the case with citations to the record, this court can satisfy itself that counsel has in fact thoroughly reviewed the record. This requirement assures that appointed counsel has diligently provided substantially equal representation to the indigent defendant. In addition, these citations to the record assist the court in determining whether counsel correctly concluded that the appeal is frivolous." *Clark*, ___ Ariz. ___, ___, ___ P.2d ___, ___, 1999 WL 16739, *9.

Because *Wende* approved a briefing procedure that satisfies the twin purposes of *Anders* — assisting the court in determining that counsel has conducted a detailed review of the record and that the appeal is frivolous — *Wende* is not contrary to or an unreasonable application of *Anders*. The mere act of filing such a brief, therefore, did not render appellate counsel's performance incompetent, and Davis is not entitled to habeas relief.

C. The Court of Appeals Failed to Give Adequate Deference to the State Court's Rejection of Davis' Claim When the Court Refused to Require Davis to Show Prejudice

The Warden argued below that even if Davis' attorney had acted incompetently, Davis' claim of

ineffective assistance of appellate counsel failed because Davis had not shown prejudice as required by *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The circuit court rejected that argument, concluding a failure to apply *Penson*, 488 U.S. 75, "would amount to an 'unreasonable application of' clearly established federal law for purposes of" § 2254(d)(1) because the filing of a *Wende* brief amounts to complete denial of counsel. App. 13a-14a.

This holding compounds the damage done by the court's invalidation of *Wende*. Absent a showing of prejudice, even a habeas petitioner who can identify no claim that should have been raised by counsel on direct appeal will be entitled to a second appeal, consuming scarce judicial resources to review yet again cases in which no one — not the attorney on direct appeal, not the state court of appeal, not the defendant — can find any trial error.

In rejecting the Warden's argument, the court held that "a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decisions." App. 12a-13a.

The full meaning of this definition is not entirely clear, nor is it clear how this definition differs from those in other circuits. The Fifth Circuit, for example, has held that a ruling is unreasonable if it is "so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard v. Johnson*, 97 F.3d 751, 767-69 (CA5 1996). The Seventh Circuit has recognized that the standard "allows the state court's conclusion to stand if it is one of several equally plausible outcomes," *Hall v. Washington*, 106 F.3d 742, 749 (CA7 1997). Merely being erroneous, and perhaps clearly erroneous, is insufficient. *Hennon v. Cooper*, 109 F.3d 330, 334 (CA7 1997). Regardless of the meaning intended by the circuit, certiorari should be

granted to resolve authoritatively the meaning of "unreasonable application" in § 2254(d)(1).

Even if the Ninth Circuit's interpretation were correct, the court's application of the test was not. It failed to recognize significant differences between this case and *Penson*.

In *Penson*, "counsel was permitted to withdraw before the court reviewed the record on nothing more than 'a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief.'" 488 U.S. at 78. The defendant's request for new counsel was denied. *Id.* at 78. "In due course, and without the assistance of any advocacy for petitioner, the Court of Appeals made its own examination of the record," "noted that counsel's certification that the appeal was meritless was 'highly questionable,'" "found 'several arguable claims,'" "concluded that plain error had been committed in the jury instructions concerning one count," reversed on that count "but affirmed the convictions and sentences on the remaining counts. It concluded that petitioner 'suffered no prejudice' as a result of 'counsel's failure to give a more conscientious examination of the record' because the court had thoroughly examined the record and had received the benefit of arguments advanced by counsel for petitioner's two codefendants." *Id.* at 79.

This Court rejected the state's argument that any error in granting withdrawal and failing to appoint new counsel was not prejudicial. "The primary difficulty with the State's argument is that it proves too much. No one disputes that the Ohio Court of Appeals concluded that the record below supported a number of arguable claims. Thus, in finding that petitioner suffered no prejudice, the court was simply asserting that, based on its review of the case, it was ultimately unconvinced that petitioner's conviction—with the exception of one count—should be reversed. Finding harmless error or a lack of *Strickland*

prejudice in cases such as this, however, would leave indigent criminal appellants without any of the protections afforded by *Anders*. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protections afforded by *Douglas* and *Anders*." 488 U.S. at 86.

Penson involved a *complete denial of counsel* on appeal *when the reviewing court found arguable issues*. 488 U.S. at 88 ("[I]t is important to emphasize that the denial of counsel in this case left petitioner completely without representation during the appellate court's actual decisional process. This is quite different from a case in which it is claimed that counsel's performance was ineffective."); *id*. ("The present case is unlike a case in which counsel fails to press a particular argument on appeal, cf. *Jones* v. *Barnes*, 463 U.S. 745 (1983), or fails to argue an issue as effectively as he or she might. Rather, at the time the Court of Appeals first considered the merits of petitioner's appeal, appellate counsel had already been granted leave to withdraw; petitioner was thus entirely without the assistance of counsel on appeal. In fact, the only relief that counsel sought before the Court of Appeals was leave to withdraw, an action that can hardly be deemed advocacy on petitioner's behalf.").

Here, counsel did not withdraw before the court reviewed the record, *and* the court did not find any arguable issues. Appellant was not "completely without representation during the court's actual decisional process," *Penson*, 488 U.S. at 88, because, unlike the

attorney in *Penson*, counsel submitted a *Wende* brief, not simply a conclusory statement that the appeal had no merit and that he would not file a brief. And because the court found no arguable issues, Davis, unlike the defendant in *Penson*, had no right to adversary representation. It is not unreasonable to conclude that under these very different circumstances, a habeas petitioner has the burden of establishing prejudice. *Cf. In re Dunn*, 514 So. 2d 1300, 1304 & n.3 (Ala. 1987) (concluding that where no brief on appeal is filed, prejudice is presumed but where *Anders* is followed and briefs are filed, a showing of prejudice would generally be required under *Strickland*).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 3, 1999.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DWAYNE A. DAVIS,	)	
Petitioner-Appellee,	)	**No. 98-16122**
	)	
v.	)	**D.C. No.**
	)	**CV-96-04646-MHP**
M.C. KRAMER,	)	
Respondent-Appellant.	)	**OPINION**
	)	

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and Submitted
December 8, 1998--San Francisco, California

Filed January 26, 1999

Before: Stephen Reinhardt, John T. Noonan, and
Michael Daly Hawkins, Circuit Judges

Opinion by Judge Reinhardt

COUNSEL

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Steven Kalar, Assistant Federal Public Defender and Geoffrey A. Hansen, Chief Assistant Federal Public Defender, San Francisco, California, for petitioner-appellee Davis.

OPINION

REINHARDT, Circuit Judge:

The state of California appeals the district court's order granting Dwayne Davis a writ of habeas corpus. We must determine whether the California courts' denial of Davis' state habeas petition, in which Davis alleged that his appellate counsel failed to satisy the constitutional requirements of *Anders v. California*, 386 U.S. 738 (1967), was "contrary to" or an "unreasonable application of" clearly established federal law. *See* 28 U.S.C. § 2254(d). Because we conclude that it was, we affirm the decision of the district court that the writ issue.

I.

In 1994, following a jury trial, Davis was convicted of first degree burglary. He was sentenced to eleven years in prison. In his appeal, Davis' appellate attorney limited her representation to filing a "no-merit brief" pursuant to the standards enunciated by the California Supreme Court in *People v. Wende* 600 P.2d 1071 (Cal. 1979). The brief merely recited the procedural history and facts of the case. Not only did the brief fail to identify any possibly meritorious arguments, it flatly failed to point to anything in the record that might have warranted an appeal. The brief simply lodged a request that the court "independently review the entire record on appeal in this case."

Following his attorney's submission of this brief, Davis filed an appellate brief on his own behalf. He argued, *inter alia*, that his trial counsel was ineffective for failing to hire an independent fingerprint expert and for failing to conduct an investigation of the crime scene, and that

the trial court erred in failing to instruct on a lesser included offense. In an unpublished decision, the California Court of Appeal affirmed the judgment of conviction.

In 1996, Davis filed pro se petitions for a writ of habeas corpus in California Superior Court, the California Court of Appeal, and the California Supreme Court. In each, he raised claims of ineffective assistance of trial and appellate counsel. Each court denied Davis' petition. The California Supreme Court summarily denied Davis' final petition in May of 1996. In December of 1996, Davis filed a pro se petition for a writ of habeas corpus in federal district court. In his federal petition, Davis again raised claims of ineffective assistance of trial and appellate counsel. He also argued, *inter alia*, that the evidence was insufficient to support his conviction, and that the trial court erred by failing to instruct the jury on the lesser included offense of trespass.

The district court granted Davis a writ. The court held that Davis had been denied the effective assistance of appellate counsel because that counsel's submission of a "*Wende*" brief, which raised no issues for appeal and pointed to no part of the record that might warrant such an appeal, failed to satisfy the federal constitutional standards enunciated in *Anders* and *Penson v. Ohio*, 488 U.S. 75 (1988). It then denied all of Davis' remaining claims.

II.

The state's primary argument in this appeal is that the district court's decision does not comport with the requirements of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). AEDPA wrought a number of changes in the statute governing habeas corpus proceedings by persons convicted of state offenses. Under § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

The state contends that the district court's decision was not supported by clearly established federal law, as determined by the United States Supreme Court, and was therefore improper. We reject the state's argument.[1]

In *Anders*, 386 U.S. at 739, the defendant had been convicted of felony possession of marijuana. On appeal, Anders' court-appointed counsel concluded that any appeal would lack merit and so notified the court in a letter brief. Other than informing him of his right to file a pro se brief, Anders' counsel failed to do anything else on his behalf. *See id.* at 739-40.

The Court delineated a court-appointed appellate counsel's duty to represent his client after "determin[ing] that there is no merit to the indigent's appeal." It began its analysis by reaffirming indigent defendants' right to counsel on appeal. The Court noted that it had "consistently held invalid those procedures 'where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law,

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1. The district court noted that Davis' petition was subject to the requirements of § 2254(d). The court correctly held that "under AEDPA, the petition may not be granted . . . unless the state court's adjudication of the claim: '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.'"

and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.'" *Id.* at 741 (*quoting Douglas v. California*, 372 U.S. 353, 358 (1963)). It then wrote that this "constitutional requirement of substantial equality and fair process" is only realized where the court-appointed counsel "acts in the role of an active advocate in behalf of his client." *Anders*, 386 U.S. at 744. In no uncertain terms, the court held that when appellate counsel simply submits a "no-merit letter," such as the one submitted by Anders' appellate counsel, he does not fulfill his constitutionally mandated responsibility to act in the "role of an active advocate." The court held that the submission of a no-merit letter is simply not "an adequate substitute for the right to full appellate review." *Id.* at 742 (quoting *Eskridge v. Washington State Bd.*, 357 U.S. 214, 215 (1958)).

The *Anders* Court then explained the procedure, required by the constitution, that an appellate counsel *must* follow if he determines that an appeal would be frivolous:

> [I]f counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal . . . .

Anders, 386 U.S. at 744.

Significantly, *Anders* goes on to hold that when an appellate attorney fails to comply with these constitutional standards, and merely files a no-merit brief of the sort filed on behalf of Anders, the defendant is deprived of his right to counsel on appeal. *See id.* at 745. In the Court's words, where counsel files a no-merit brief that does not comport with these standards, the defendant is left to "shift *entirely* for himself." *Id.* (*emphasis added*).

In *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), we applied *Anders* to a case factually indistinguishable in all relevant respects from the case at bar. Although *Robbins* was a pre-AEDPA case, because our decision there was simply an application of *Anders, Robbins'* reasoning is equally applicable in AEDPA cases.

In *Robbins*, defendant's appellate counsel filed a "no-merit brief" pursuant to *People v. Wende*, 600 P.2d at 1074. *Robbins*, 152 F.3d at 1064. The brief filed in *Robbins* was indistinguishable from the brief filed by Davis' appellate counsel here: it "briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues." *Id.* As here, Robbins filed an appellate brief on his own behalf, but his appeal was unsuccessful. As here, the district court granted Robbins' petition for a writ of habeas corpus, holding that Robbins' appellate counsel had failed to satisfy the requirements established in *Anders*.

The state argued in *Robbins*, as it does here, that because the no-merit brief complied with the standards enunciated by the California Supreme Court in *Wende*, the district court erred in determining that the brief was insufficient under *Anders*. *Robbins*, 152 F.3d at 1066.[2]

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2. Under *Wende*, an appellate attorney may file a brief that

The *Robbins* court expressly rejected the state's argument. *Id.* at 1066-67. Relying on "the United States Supreme Court's requirements set forth in *Anders*," the court held that, despite the fact that the no-merit brief complied with *Wende*, the requirements of *Anders* "were not met." *Id.* at 1067. As the court wrote:

> The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court 'independently review the entire record for arguable issues.' Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.
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> *Id.*[3]

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merely "set[s] forth a summary of the proceedings and facts with citations to the transcript, raise[s] no specific issues, and call[s] upon the court to make a thorough review of the record to determine for itself whether there were any arguable issues." 600 P.2d at 1074. The nonexistence of arguable issues, moreover, may be inferred from counsel's failure to raise any, and counsel need not withdraw unless he explicitly describes the defendant's case as "frivolous." *Id.* at 1075.

3. In *United States v. Griffey*, 895 F.2d 561, 562 (9th Cir. 1990), we held similarly that a brief, which satisfied the requirements of *Wende*, failed to comport with the constitutional requirements of *Anders*. The brief at issue in *Griffey* was, again, indistinguishable from the brief filed by Davis' counsel. The *Griffey* brief: "summarized the proceedings in the district court, recited the facts of the case, and stated that counsel had reviewed the record and 'located no specific issues' for appeal." *Id.* As here, counsel in *Griffey* "did not say the appeals were frivolous and did not move to withdraw," but asked the court to review the record. *Id.* Our holding in *Griffey* that the brief was inadequate was based entirely on Supreme Court precedent, namely *Anders*. Because, as *Anders* dictates, a brief must refer "to

There would be no question that the case at bar is controlled by *Robbins* if this were a pre-AEDPA case. Again, the no-merit brief filed by Davis' appellate counsel is indistinguishable from the brief at issue in *Robbins*: both briefly summarized the procedural and factual histories of the cases, and requested that the state appellate court independently review the entire record for arguable issues. It is equally obvious, however, that in *Robbins* we were applying "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d), namely *Anders v. California*. *Robbins* was, in fact *nothing more* than an application of *Anders* to facts indistinguishable from those presented here. In reaching its holding, the *Robbins* court wrote that "[o]ur obligation . . . is to determine whether appellate counsel met his obligations *under the United States Supreme Court's requirements set forth in Anders and its progeny*." *Robbins*, 152 F.3d at 1066-67 (emphasis added). The court's conclusion was that although a *Wende* brief had been filed, "the district court correctly found that *Robbins's counsel did not comply with Anders*." *Id.* at 1067 (emphasis added). Finally, the court concluded that "the outcome of Robbins's case was *predetermined* by the controlling analysis provided by the Supreme Court in *Anders* . . . ." *Id.* at 1068 (emphasis added).

[1] As *Robbins* makes clear, *Anders* clearly establishes that a no-merit brief such as the one filed by Davis' appellate attorney does not satisfy federal constitutional standards. Here, the state court decision we review is "contrary to . . . clearly established Federal law, as determined by the Supreme Court." As in *Anders*, Davis' counsel left Davis to "shift entirely for himself," and

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anything in the record that might arguably support the record," we held in *Griffey* that an attorney who files a *Wende* brief that fails to do so fails to fulfill his role as advocate, and leaves the defendant to "shift entirely for himself." *See id.* (*quoting Anders*, 386 U.S. at 744).

thereby failed to fulfill the "role of an active advocate" required by the constitution. *Anders*, 386 U.S. at 745, 744. Under *Anders*, Davis is entitled to a fresh appeal. The California court's denial of davis' writ on his claim of ineffective assistance of appellate counsel is contrary to *Anders* and in this regard, the District Court's decision comports with AEDPA.[4]

III.

The state next argues that the district court erred in granting petitioner a writ without determining that Davis was prejudiced by his appellate counsel's performance.[5] In *Penson v. Ohio*, 488 U.S. 75 (1988), the Supreme Court considered the question whether a petitioner who suffers ineffective assistance under *Anders* must also show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). In *Penson*, petitioner's appellate counsel, like Davis' appellate counsel here, filed a no-merit brief. 488 U.S. at 77-78. The attorney then requested, and was granted, leave to withdraw from the case. As the Court wrote, "counsel was permitted to withdraw before the court reviewed the record on nothing more than a

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4. In *Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997), the court held that *Faretta v. California*, 422 U.S. 806 (1975) "clearly established" a rule of law regarding the timeliness of a request for self-representation. In dicta, the *Moore* court suggested that the timeliness rule was "necessary to the [*Faretta*] Court's decision, and therefore is a holding of the Court." *Moore*, 108 F.3d at 265. *Moore* does not establish a requirement that a rule be "necessary" to a Supreme Court "holding" in order to clearly establish Federal law. It merely points out that such was the case with respect to *Faretta*.

5. In its brief, the state also argues that the district court failed to determine whether counsel was "incompetent." By failing to comply with the requirements of *Anders*, counsel's performance failed to comport with constitutional standards. *See Anders*, 386 U.S. at 738. No separate *Strickland* competence analysis is called for when counsel fails to comply with *Anders*.

conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief." *Id.* at 78. The state court subsequently granted petitioner 30 days in which to file an appellate brief pro se, but denied petitioner's request for the appointment of a new attorney. *See id.* The state court of appeals affirmed petitioner's conviction.[6]

The *Penson* Court first reiterated the holding of *Anders*, that "a criminal appellant may not be denied representation on appeal based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Id.* at 80. It then held that "[c]ounsel's failure to file such a brief left the Ohio court without an adequate basis for determining that he had performed his duty carefully to search the case for arguable error and also deprived the court of the assistance of an advocate in its own review of the cold record on appeal." *Id.* at 82. The state in *Penson*, argued, however, that even if the court had erred in granting appellate counsel's motion to withdraw and in failing to appoint new counsel, petitioner failed to show prejudice under *Strickland* and therefore the state court's affirmance of Penson's conviction was not in error.

The *Penson* Court completely rejected the claim that a showing of prejudice was required. As the Court wrote, requiring a showing of prejudice in cases such as this:

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6. The court actually reversed petitioner's conviction on one count, on the ground that the trial court had given an erroneous jury instruction. *See Penson*, 488 U.S. at 79. It affirmed on all other counts noting that the petitioner had "'suffered no prejudice' as a result of 'counsel's failure to give a more conscientious examination of the record' because the court had thoroughly examined the record and had received the benefit of arguments advanced by counsel for petitioner's two codefendants." *Id.*

> would leave indigent criminal appellants without any of the protections afforded by *Anders*. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protections afforded by *Douglas* and *Anders*.

488 U.S. at 86.

The state argues that *Penson* cannot control this case because in *Penson*, unlike in the case before us, the appellate counsel formally withdrew. According to the state, unless appellate counsel formally withdraws, the defendant is not "without representation," *id.* at 88, and thus it is inappropriate to apply *Penson's* rule of presumed prejudice. We conclude, however, that while there is indeed a difference between *Penson* and the present case, a failure to apply *Penson* here would amount to an "unreasonable application of" clearly established federal law for purposes of 28 U.S.C. § 2254(d).

To date, we have not defined the term "unreasonable application" as used in § 2254(d), nor have we explained the difference between "contrary to" and "unreasonable application of," as used in that section. Clearly, however, both terms reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court. Moreover, as some other circuits have correctly pointed out, the statutory terms are not

amenable to a rigid distinction, *see, e.g., O'Brien v. DuBois*, 145 F.3d 16, 22 (1st Cir. 1998), and have "overlapping meanings," *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998).

The terms, read together, delineate the range of cases that warrant federal habeas relief. The simplest of these cases fall squarely within the term "contrary to." They arise where a Supreme Court decision clearly establishes a rule that is dispositive of the petitioner's claim, in a factual context that is indistinguishable from—albeit not necessarily identical to—that presented by petitioner's case. If, in such circumstance, the state court decides the case in a way that violates the rule established by the Supreme Court, that decision is, without question, "contrary to" clearly established federal law. Such cases generally do not call for extensive factual or legal interpretation, but involve the fairly straightforward invocation of a precedent. The remaining cases within the range that warrants federal habeas relief are covered by the term "unreasonable application." These cases arise where there are more substantial legal or factual differences between the Supreme Court precedent and the case at bench, but it would be unreasonable to fail to apply the principle contained in such precedent to the pending case. In that circumstance, the state court's failure to properly apply the relevant principle is an "unreasonable application." *See also Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) (a state court decision represents an "unreasonable application of" clearly established federal law when, *inter alia*, "that decision fails to apply the principle of a precedent in a context where such failure is unreasonable").[7] In other words, a state

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7. In a footnote in *Moore v. Calderon*, 108 F.3d 261, 265 n.3 (9th Cir. 1997), we stated in dicta that the "contrary to" test applies to questions of law, while the "unreasonable application" test applies to mixed questions of fact and law. As the above discussion illustrates,

court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decisions.[8]

[2] It is true, as the state points out, that in *Penson* the appellate counsel formally withdrew from representing the petitioner, while in this case Davis' appellate counsel did not formally withdraw. *Anders*, 386 U.S. at 745. The legal principles established in *Anders* and *Penson*, however, extend to cases in which appellate counsel does not formally withdraw. As noted, the *Anders* Court established the rule that when an appellate counsel files a "no-merit" brief that fails to comport with the standards enunciated in that case, he fails to fulfill his "role as advocate," and thereby leaves the defendant to "shift *entirely* for himself." *Id.* at 744, 745 (emphasis added.)

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this is frequently the case, because when a Supreme Court precedent requires a purely legal interpretation it will generally be possible to determine whether the relevant state court decision was "contrary to" that precedent. On the other hand, where legal and factual differences exist, the failure to follow the controlling rule will ordinarily constitute an "unreasonable application" of federal law. In any event, in the *Moore* footnote we did not attempt a complete definition of these statutory terms, or set forth an inflexible rule. Nor do we here.

8. The definition we offer here is not intended to be exhaustive. Rather, it sets forth certain circumstances in which a state court's determination amounts to an "unreasonable application." There are, of course, other circumstances comprehended by the term we construe. If, for example, a state court applies a Supreme Court precedent in a context where such application is unreasonable, the decision would amount to an unreasonable application. So too would a state court decision that, in applying federal law, simply misinterprets the relevant Supreme Court precedent. *See, e.g., Green*, 143 F.3d at 870.

Therefore, it is the appellate counsel's failure to conform with *Anders*, irrespective of counsel's decision to formally withdraw from a case, that leaves the defendant "entirely" to his own devices, and entirely without representation. It is also obvious that a defendant left to "shift entirely for himself' is a defendant left, in the words of the *Penson* Court, "completely without representation during the appellate court's actual decisional process." *Penson*, 488 U.S. at 88. Accordingly, in a case where the defendant's appellate attorney does not formally withdraw but fails, nonetheless, to comport with the requirements of *Anders*, the defendant is "completely without representation" and *Penson's* rule of presumed prejudice must be applied. A failure to apply the rule of presumed prejudice simply because the attorney has not formally withdrawn is a failure to apply the "principle of a precedent in a context where such failure is unreasonable." *Green*, 143 F.3d at 871. It therefore amounts to an "unreasonable application of' clearly established federal law, as determined by the Supreme Court.

This reading of *Penson's* reach is supported by another circuit. In *Lofton v. Whitley*, 905 F.2d 885 (5th Cir. 1990), the Fifth Circuit considered whether *Penson's* rule of presumed prejudice extended to a situation where, as here the appellate counsel had filed a deficient no-merit brief, but had not formally withdrawn from the case. As the Fifth Circuit wrote, "that counsel did not formally withdraw does not appear to be a significant distinction that would change the analysis from the presumed prejudice of *Penson* . . . . Lofton may have been formally represented by counsel, but the *failure to raise any grounds for appeal was the equivalent of his attorney's withdrawal.*" *Id.* at 888 (emphasis added). This part of the court's opinion was based entirely on *Penson* and *Anders*. Accordingly, as the Fifth Circuit confirms, even where an attorney does not formally withdraw from the case, *Anders* and *Penson* dictate that the attorney's failure to comply

with the requirements of *Anders* results in the deprivation of the defendant's right to counsel. *See Anders*, 386 U.S. at 745; *Penson*, 488 U.S. at 83-85. Again, it is an unreasonable application of clearly established Supreme Court law not to extend *Penson's* rule of presumed prejudice to this circumstance.[9]

IV.

In granting Davis' writ on his claim of ineffective assistance of appellate counsel, the district court held that Davis had raised at least three arguable underlying claims: ineffective assistance of trial counsel, insufficiency of the evidence, and jury instruction error. Because the underlying claims were arguable, the district court held that Davis' appellate counsel should have raised them on direct appeal. The district court also conducted its own review of these same underlying claims and, under the

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9. That the failure to apply a rule of presumed prejudice in this case is an "unreasonable application of" federal law is also evident from the Supreme Court's decision in *United States v. Cronic*, 466 U.S 648 (1984). In *Cronic*, decided the same day as *Strickland*, the Supreme Court enunciated conditions where *Strickland's* prejudice requirement does not apply. The Court held that there are circumstances "that are so likely to prejudice the accused" that prejudice should be presumed. *Id.* at 658. In enumerating these circumstances, the Court wrote that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659. Significantly, *Cronic* cited *Anders* for the proposition that "the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.'" *Id.* at 656 (*quoting Anders*, 386 U.S. at 743). As we know from *Anders*, when a counsel files a no-merit brief that fails to comport with the standards enunciated there, the counsel fails to act "in the role of an advocate." Accordingly, *Cronic* like *Penson*, dictates a rule of presumed prejudice in cases such as the one at bar. Failure to apply that rule amounts to an "unreasonable application of" federal law.

standards enunciated in 28 U.S.C. § 2254(d), held that Davis did not "establish his entitlement to federal habeas relief" on any of them. The state argues that because the district court denied Davis' petition on the underlying claims, Davis cannot "vindicate" any federal right by returning to the state court for a fresh appeal. The state argues, in essence, that because the district court denied Davis federal habeas relief on his underlying claims, Davis should be estopped from trying to litigate these claims in a state court appeal.

[3] The state's argument is erroneous. The district court's denial of Davis' petition on his underlying claim indicates nothing more than the district court's conclusion that the state court's rejection of those claims was not contrary to federal law as established by the United States Supreme Court. In a direct appeal, the state court would apply an entirely different standard of review to Davis' claims. For this reason, regardless of the district court's ruling as to whether any of these alleged violations entitled him to habeas relief, Davis indeed may vindicate his federal rights by returning to the state court for a fresh appeal.[10]

[4] Moreover, the state's argument, if accepted, would serve to import a prejudice requirement through the back door. The state asks this court to hold that Davis is not entitled to relief on his *Anders* claim because, it believes, his appeal will not succeed. As stated above, where a defendant suffers a violation of *Anders*, he need not show prejudice. He certainly need not show that he will prevail

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10. A heightened standard of harmless error analysis, moreover, applies in federal habeas corpus proceedings. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619 (1993). Under *Brecht*, in a federal habeas proceeding "the standard for determining whether habeas relief must be granted is whether . . . the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 623 (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

on appeal. *See, e.g., Penson*, 488 U.S. at 86. Because Davis' appellate counsel failed to comply with the constitutional requirements of *Anders*, Davis is entitled to a fresh state court appeal, irrespective of the district court's resolution of his federal habeas claim. By affording Davis this appeal, his federal right to effective assistance of counsel, enunciated in *Anders*, will be vindicated.

V.

The district court's order granting Davis a writ on the issue of ineffective assistance of appellate counsel is therefore AFFIRMED.

APPENDIX B

FILED
Mar 25 1998
RICHARD W. WIEKING
Clerk, U.S. District Court
Northern District of
California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DWAYNE DAVIS,	)	
	)	
Petitioner,	)	**No. C 96-4646 MHP (pr)**
	)	
v.	)	**ORDER GRANTING**
	)	**PETITION FOR WRIT OF**
M.C. KRAMER,	)	**HABEAS CORPUS AND**
	)	**DENYING RESPONDENT'S**
Respondent.	)	**MOTION FOR SUMMARY**
_____	)	**JUDGMENT**

Entered in Civil Docket: Mar 25, 1998

INTRODUCTION

This matter is now before the court for consideration of Dwayne Davis' *pro se* petition for writ of habeas corpus and respondent M.C. Kramer's motion for summary judgment on the petition. For the reasons discussed below, the petition will be granted on the ineffective assistance of counsel claim. The motion for summary judgment will be denied because the respondent has not shown he is entitled to judgment as a matter of law.

BACKGROUND

Dwayne Davis challenges his conviction for burglary of an apartment in San Francisco. At trial, the defense conceded that a burglary had occurred and focused instead on whether Davis has been the burglar. The bulk of the evidence at trial concerned the physical layout of a bedroom window in the apartment which was the believed entry point for the burglar, and Davis' fingerprints on that window.

Christy Aoki and Terri Peaker shared an apartment on Sutter Street in San Francisco. Fern Street ran behind the apartment building and an alley ran between the apartment building and a neighboring building. The alley led to a tradesman's entrance to the neighboring building. A landing outside Aoki's apartment could be reached from the tradesman's entrance area. A sliding glass door from Aoki's bedroom and a window from Peaker's bedroom opened on to the landing. Ornamental bars partially covered the window to Peaker's bedroom.

The burglary occurred on December 27, 1993 while Aoki was out for the evening at a movie and Peaker was out of town on vacation. When Aoki returned home from the movie, she discovered the apartment in a state of disarray. Items worth approximately $5,000 were missing. The floor lock and door handle lock on the door from her bedroom to the landing were unlocked and the door was open. Peaker's bedroom window was open, and the ornamental bars on the window were bent back.

Police inspector Moses, a crime scene investigator and expert in fingerprints found several useable latent fingerprints on the outside of the moving or sliding part of Peaker's bedroom window. He found prints of a hand on the outside of Peaker's window underneath the bars in the center of the window. These fingerprints showed there was motion: the prints indicated that the hand was pushing from the left to right to open the window. Moses obtained useable prints from the thumb and little finger

on the hand, but the prints from the middle fingers were smeared because of the hand's movement. Moses opined that, given the length of the hand movement shown by the prints, the prints could not have been deposited until the ornamental bars had been bent. Moses also stated that fingerprints would begin to decompose as time progressed, depending on the composition of the print and the environment around the surface where the print was left.

The trial was brief. The prosecutor called Aoki, Peaker and Moses to testify. They were briefly cross-examined by the defense attorney. The defense called no witnesses. In the closing argument, defense counsel conceded that Davis' fingerprints were on the outside of the window and conceded that the apartment had been burglarized. He tried to get the jury to focus on whether it was Davis who had done the burglary. He noted the absence of Davis' fingerprints inside the apartment, despite the fact that the apartment had been messed up during the burglary. He also suggested to the jury during closing argument that the evidence showed simple trespass by his client whose fingerprints were on the window.

Davis was convicted of first degree burglary. Cal. Pen. Code §§ 459, 460. The court found true the allegation that Davis had suffered a prior serious felony conviction. Cal. Pen. Code §§ 667(a), 667.5(b). Davis was sentenced in 1994 by the San Francisco County Superior Court to eleven years in prison. The California Court of Appeal affirmed the conviction and the California Supreme Court denied review. Davis filed a petition for writ of habeas corpus in the California Supreme Court, but it was summarily denied in 1996.

DISCUSSION

A. Standard of Review

This court will entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The petition in this case was filed in December 1996, several months after the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was enacted, and therefore is subject to the AEDPA. Under the AEDPA, the petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

B. Legal Claims

1. Ineffective Assistance of Trial Counsel

The Sixth Amendment to the United States Constitution provides that criminal defendants have the right to counsel. The right includes not only assistance of counsel, but *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Strickland* established a two-part test which governs any claim that a criminal defendant received ineffective assistance of counsel: the criminal defendant must show that counsel's performance was deficient and that counsel's errors were so serious that they deprived the defendant of a fair trial, i.e., a trial whose result is reliable. *Id.* at 687.

Davis contends that his trial attorney was ineffective in that he failed to hire a fingerprint expert, failed to hire an investigator to inspect the crime scene, advised Davis not to testify, and failed to call an alibi witness.[1/]

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1. Davis also originally alleged that his attorney was ineffective in that he had not challenged jurors, interviewed witnesses, or been

a. Fingerprint Expert

Davis contends that his attorney should have hired a fingerprint expert who could have refuted Inspector Moses' testimony that the fingerprints ont he window were Davis'. He does not show how this could have been done, and the record before this court does not support his claim. Inspector Moses, the prosecution's fingerprint/crime scene analyst, had substantial training and experience in fingerprint collection and analysis as well as crime scene analysis. The fingerprint evidence in this case was straightforward. Davis' contention that a defense expert could have undermined Moses has no factual support and therefore does not establish ineffectiveness. "[T]he presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense," *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 718 (1996).

Davis suggests that an expert would have shown negligence by Moses in waiting overnight to take fingerprints from the crime scene. An expert would not have made a difference on this point. The testimony at the trial established that there was a time lapse between the discovery of the burglary at about 10:15 p.m. and Moses' collection of the prints at about 9:30 the next day. An expert was not needed to make the argument that Davis' fingerprints could have been made on the window between the time of the burglary discovery and the time of the fingerprint collection.

Davis also contends that Moses was negligent for not arresting Davis until five months after the burglary. The lapse of time between the crime and the arrest is irrelevant to Davis' guilt. Additionally, Davis has not

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aware of favorable case law. After respondent moved to dismiss on the ground that these three claims were not exhausted, Davis abandoned these claims.

shown why an expert was needed to testify concerning this time lapse.

b. Investigating the Scene

Davis next contends that his attorney was ineffective because he did not hire an investigator to inspect the scene, which would have revealed that there was public access to the window. The evidence at trial demonstrated that the window on which Davis' fingerprints were found was accessible to the public, although perhaps out of the way. Pictures were admitted into evidence and shown to the jury which showed the apartment window and the surrounding area. One of the burglary victims testified as to the set-up of the building and the location of the window on which Davis' fingerprints were found. Davis' attorney was not engaged in deficient performance in not obtaining and presenting cumulative evidence concerning the entry point of the apartment. *See United States v. Schaflander*, 743 F.2d 714, 718 (9th Cir. 1984), *cert. denied*, 470 U.S. 1058.

c. Advising Davis Not to Testify

Davis states that his attorney advised him not to testify at trial and this prevented him from taking "the witness stand to declare his innocence." Amended Petition, p. 7. Had Davis testified, he could not have simply testified that he was innocent and left the stand. He could have been questioned about his significant criminal history, most notably his earlier burglary convictions. He also could have been questioned about why he had opened the window to that apartment, as evidenced by the motion of his fingerprints on the window. These very problematic areas of potential cross-examination for Davis could have convinced his attorney that it was a wise tactical choice not to have Davis testify. In fact, Davis' attorney tried (albeit unsuccessfully) to have allegedly favorable information about Davis admitted via

a police officer just so that Davis would not be subjected to cross-examination. Davis' attorney made a reasonable tactical choice to avoid cross-examination of Davis. The only way to do that was to keep Davis from testifying at all. Davis has not shown incompetence or prejudice in the attorney's advice that Davis should not testify.

d. Failing to Call Alibi Witness

Davis contends that his attorney was ineffective in that he failed to subpoena his alibi witness, even though the attorney knew of the witness' existence and address. Davis has not produced an affidavit from his unnamed witness showing that she would have been at the trial or that she would have testified favorably to him at the trial. *See United States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988), *cert. denied*, 488 U.S. 910 (1988). Davis has not made the necessary showing of deficient performance by his trial attorney and resulting prejudice to his case. Accordingly, his claim that he received ineffective assistance of trial counsel fails.

2. Ineffective Assistance of Appellate Counsel

Davis contends that his appellate counsel was ineffective for filing a brief raising no issues and requesting that the Court of Appeals independently review the record pursuant to *People v. Wende*, 25 Cal.3d 436 (1979). Davis argues that appellate counsel should have raised the same claims he presented in his petition to this court.

The Ninth Circuit has recently addressed the constitutional adequacy of the procedures outlined by the California Supreme Court in *Wende*. *Robbins v. Smith*, 125 F.3d 831 (9th Cir. 1997). The Ninth Circuit reviewed the constitutional requirements laid out in *Anders v. California*, 386 U.S. 738 (1967) and *Penson v. Ohio*, 488 U.S. 75 (1988), which govern appointed counsel's duty in a situation where counsel has determined an appeal to be

without merit. *Id.* at 833-34. Specifically, appointed counsel must either provide active and vigorous appellate representation of indigent criminal defendants or, after conducting a conscientious examination of the record and concluding that any appeal would be wholly frivolous, request leave to withdraw and file a brief identifying anything in the record that might arguably support an appeal. *Id.* at 834 (citing *Anders*, 386 U.S. at 744; *Penson*, 488 U.S. at 80, 83-84). The Ninth Circuit concluded that the filing of a "*Wende* brief" which briefly summarizes the procedural and historical facts of the case and requests that the state appellate court independently review the entire record for arguable issues, does not comply with these constitutional standards and results in ineffective assistance of appellate counsel. *See id.*

Although Davis does not establish his entitlement to federal habeas relief on any of the other issues raised in his petition, he has raised arguably nonfrivolous issues that could have been raised on appeal in the state court, e.g., ineffective assistance of trial counsel, the sufficiency of the evidence, and jury instruction error. Because appellate counsel failed to present these issues to the California Court of Appeals, counsel was ineffective. *See id.*

3. Sufficiency of the Evidence

Davis claims that the evidence was insufficient to support the verdict of first degree burglary because the only evidence linking him to the crime scene were his fingerprints on the exterior of the apartment window. Relying on *Mikes v. Borg*, 947 F.2d 353 (9th Cir. 1991), *cert. denied*, 505 U.S. 1229 (1992). Davis argues that such fingerprint evidence alone is not a sufficient basis to support the guilty verdict.

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

A federal court reviewing collaterally a state court conviction does not determine whether it is satisfied that the evidence established guilt beyond a reasonable doubt, however. *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992), *cert. denied*, 510 U.S. 843 (1993). Instead, it "determines only whether, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The issue here is whether the fingerprint evidence was sufficient to connect Davis to the crime. No one contends that the burglary did not occur; the parties' disagreement centers on whether the fingerprint evidence proved that Davis was the perpetrator.[2]

The evidence showed (1) Davis' fingerprints were on the exterior of a bedroom window, (2) that window was the point of entry for the burglary, (3) ornamental bars covering the window had been bent back, (4) Davis' fingerprints on the window were not and could not have been made until after the ornamental bars were bent back, (5) Davis' fingerprints showed a sliding motion, indicating that his hand had been sliding the window open when his fingerprints were left on the window, (6) fingerprints on exterior windows would deteriorate over time and would not be identifiable forever, (7) the apartment had been burglarized on the night of December 27, 1994, the night that one of its residents discovered the bent-back bars, (8) the window on which Davis' fingerprints were found opened onto a landing on an alleyway behind the building, and (9) Davis' fingerprints were lifted off the window the day after the burglary.

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2. Under California law, a burglary is the entry into a structure with the specific intent to commit any felony or petit larceny. Cal. Pen. Code § 459; BAJI 14.50.

In *Mikes v. Borg*, 947 F.2d at 361, the Ninth Circuit explained how certain fingerprint should be viewed:

> [I]n a case which the prosecution's theory is that the defendant's fingerprints were placed on the murder weapon at the time of the commission of the crime or were left at the scene of the crime during its commission, the record must show that the object was inaccessible to the defendant or that the defendant did not have access to the crime scene, during the relevant period prior to the crime's commission.

The *Mikes* case had facts that are distinguishable from Davis's case, and those facts lead to a different outcome for Davis. In *Mikes*, the victim was killed with a metal post from a disassembled turnstile which the victim had bought four months earlier at a hardware store's going-out-of-business sale. The victim had stored the turnstile posts in his private basement. Mikes' fingerprints were on the post, but nowhere else at the crime scene. The fingerprints were the only evidence linking Mikes to the crime scene. Those prints were not enough, concluded the Ninth Circuit, because the posts were accessible and very likely to have been touched by the general public in the store before the victim bought the posts, there was testimony that the prints could last indefinitely on the posts, and Mikes' fingerprints were not identified elsewhere at the crime scene. The evidence in Davis' case differed in a few key respects from that in *Mikes*: Davis' fingerprints were left on a window at the crime scene which had always been at that scene (while Mikes' fingerprints were on an object that had been brought to the crime scene four months before the crime); Davis's fingerprints were made reaching around or through bars that had been bent on an apartment window on a landing off a back alley (while Mikes' fingerprints

were on an object that was expected to have been touched by the general public); and Davis' fingerprints on an exterior window in San Francisco would not have lasted long (while Mikes' fingerprints on the posts would have lasted indefinitely).

Contrary to Davis' assumption, *Mikes* does not lay down a blanket rule that a defendant can never be convicted in a fingerprint-only case. Indeed, the Ninth Circuit later recognized that the *Mikes* case does not cover all fingerprint-only cases in *Taylor v. Stainer*, 31 F.3d 907 (9th Cir. 1994). There a fingerprint was found on the bottom edge of the victim's window sill. The *Taylor* court distinguished *Mikes* on the facts:

> The turnstile and the posts in *Mikes* had been in a store -- a public place where anyone could have had access to them. The inside of [the victim's] windowsill was not in a public place, and Taylor would not have had access to it absent some unusual circumstance. Moreover, the print was found precisely at the point of entry for this burglary-murder, and the location of the print under the sill strongly suggests it was left by someone crawling through the window. Thus, *Mikes* does not control here. To hold that the evidence against Taylor was insufficient, we would have to extend *Mikes* to cover fingerprints that are found in places or on objects that were never accessible to the general public and that can be explained in a manner consistent with innocence only through far-fetched, unsupported speculation. This we decline to do. *Taylor*, 31 F.3d at 909-10.

Davis' case is far more similar to *Taylor* than to *Mikes*. Davis' prints were found precisely at the point of entry, the prints were made while the window was being

opened, the time frame during which the prints were made was narrow (as evidenced by the testimony that outdoor prints deteriorate in the San Francisco environment and testimony that the prints were made after the bars were bent back), and the prints were found in a place not generally expected to be touched by the public. Davis argues that the prints show perhaps a trespass. This sort of argument has been rejected before: "'Although it is true that [defendant] could have left the prints on the outside of the glass while just trespassing in the backyard, evidence need not be inconsistent with every conclusion save that of guilt, provided it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt.'" *Taylor*, 31 F.3d at 910 (quoting *Government of the Virgin Islands v. Edwards*, 903 F.2d 267, 271 (3d Cir. 1990)).

Viewing the evidence in Davis' trial in the light most favorable to the prosecution, a rational trier of fact could have found Davis guilty of first degree burglary beyond a reasonable doubt. Habeas relief is not warranted on the insufficient evidence claim.

4. Witness Sirgussa

a. Relevant Facts

Davis claims that police officer Peter Sirgussa should have been permitted to testify. Davis states that Officer Sirgussa could have testified that Davis was homeless at the time of his arrest. If this testimony was admitted, Davis' attorney could have argued that Davis might have been seeking shelter in the enclosed alley behind the apartment building and might have left fingerprints in the process of doing so. Officer Sirgussa also could have testified that, when Davis was arrested five months after the burglary, Davis said he had been at his sister's house with his girlfriend at the time the apartment was burglarized.

The prosecutor did not call Officer Sirgussa as part of his case-in-chief, and the defense attorney requested that Officer Sirgussa be summoned so he could testify for the defense. After hearing the defense attorney's summary of Sirgussa's expected testimony, the trial court denied the request, because the statements Sirgussa would give would be hearsay. Davis' attorney was unable to articulate any exception to the hearsay rule that would let Sirgussa relay Davis' statements. (Davis was not inclined to testify because he wanted to avoid the prosecutor "exploring other issues." The other issues Davis did not want explored may have included his prior criminal history and the reason his fingerprints were on the window.)

b. Analysis

A state court's evidentiary ruling is not subject to federal habeas review unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991).

The Due Process Clause does not guarantee the right to introduce *all* relevant evidence. *Montana v. Egelhoff*, 116 S. Ct. 2013, 2016-17 (1996). A defendant does not have an unfettered right to offer evidence that is incompetent, privileged or otherwise inadmissible under standard rules of evidence. *Id.* In determining whether the exclusion of evidence was constitutionally impermissible, the court balances the importance of the evidence to the criminal defendant against the state's interest in excluding the evidence. *Miller v. Stagner*, 757 F.2d 988, 994 (9th Cir.), *amended*, 768 F.2d 1090 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048, *and cert. denied*, 475 U.S. 1049 (1986). The court considered the probative value of the evidence on the central issue, its reliability,

whether it is capable of evaluation by the trier of fact, whether it is the sole evidence on the issue or merely cumulative, and whether it constitutes a major part of the attempted defense. *Id.; Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983) (no constitutional violation in excluding evidence that another man was seen near scene and that he had history of sexual attacks where identification of petitioner was strong). The court also must consider the purpose of the rule under which the evidence was excluded, the rule's importance, how well the rule implements its purpose, and how well the purpose applies to the case at hand. *Miller*, 757 F.2d at 994-95. Due weight must be given to the substantial state interest in preserving orderly trials, in judicial efficiency, and in excluding unreliable or prejudicial evidence. *Id.*

In Davis' case, the trial court did not allow the defense to call Officer Sirgussa because his expected testimony was hearsay. Defense counsel was unable to articulate an exception to the hearsay rule which would allow the testimony in and Davis is unable to articulate such an exception today. Although the exclusion of the evidence implicated Davis' constitutional right to present a defense, that right is not absolute. *See Montana v. Egelhoff*, 116 S. Ct. at 2017. The unreliable evidence was properly excluded under the state's hearsay rule. Enforcement of the hearsay rule has long been understood to be a substantial state interest. The hearsay rule implements the state's interest in preventing jurors from deciding cases based on unreliable evidence where they cannot evaluate the maker of the statement. Although Davis' defense may have been aided by Officer Sirgussa's recitation of statements Davis made at the time of his arrest, Davis' interest in having the statements in evidence did not outweigh the state's interest in excluding them. The trial court's refusal to summon Sirgussa to the courthouse to testify did not violate Davis' right to present a defense or right to due process.

5. Failure to Give Jury Instruction on Trespass

Davis contends that the trial court violated his due process rights by refusing to give instructions on the lesser included offense of trespass.[3] The contention lacks merit.

There is no settled rule that a trial court must instruct on all lesser included and lesser related offenses. Although instructions on lesser included offenses must be given in capital cases, *Beck v. Alabama*, 447 U.S. 625 (1980), the law is unsettled as to whether such instructions must be given in noncapital cases. The Ninth Circuit has noted that "[t]here is no settled rule of law on whether *Beck* applies to noncapital cases such as the present one. In fact, this circuit, without specifically addressing the issue of extending *Beck*, has declined to find constitutional error arising from the failure to instruct on a lesser included offense in a noncapital case." *Turner v. Marshall*, 63 F.3d 807, 819 (9th Cir. 1995) (citing *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984)). The law concerning the duty to give instructions on lesser *related* offenses is even more unsettled. "[A]ny finding of constitutional error would create a new rule, inapplicable to the present case under [*Teague v. Lane*, 489 U.S. 288 (1989).]" *Turner*, 63 F.3d at 819. Davis' argument, if adopted, would require this court to create a new rule regarding the duty to instruct on a lesser related offense, but this court is barred from creating such a new rule by *Teague*, which held that (with a few exceptions not relevant here) a federal court may not grant habeas

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3. Trespass is not a lesser included offense in a burglary under California law. *See People v. Lohbauer*, 29 Cal.3d 364, 369 (Cal. 1981); *People v. Wetmore*, 22 Cal.3d 318, 327 & n.8 (Cal. 1978); *People v. Irizarry*, 37 Cal.App.4th 967, 973 (Cal.App. 1995). It may, however, be a lesser related offense. California law requires instruction on lesser related offenses under certain circumstances. *People v. Geiger*, 35 Cal.3d 510, 526 (1984).

corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final.

Notwithstanding the lack of a specific rule requiring the court to instruct on lesser included and lesser related offenses, the court also considers the failure to instruct as it would consider any claim of instructional error. That is, the failure to instruct on lesser included or lesser related offenses may rise to the level of a Constitutional violation if "the error infects the entire trial to such an extent that the resulting conviction violates due process." *See Hendricks v. Vasquez*, 974 F.2d 1099, 1106 (9th Cir. 1992).

Under California law, a trial judge need not give a requested instruction when the evidence does not substantially support the request. *See id.* at 1107 (citing *People v. Flannel*, 603 P.2d 1 (Cal. 1979). The California Court of Appeal determined that the trial court "correctly refused to [give the trespass instruction], as there was no evidentiary basis, other than an unexplainable rejection of the prosecution's evidence, from which the jury could have found the offense less than charged." (Respondent's Motion To Dismiss, Exh. 3, p. 2.) This was not an unreasonable determination of the facts or the law.

The evidence did not support the requested instruction on trespass (which is known as "unauthorized entry" in California Penal Code Section 602.5). Although Davis' attorney argued in closing that the evidence showed a trespass rather than a burglary, he made much of the fact that fingerprints only existed on the exterior of the sliding window. "If someone enters a building, it leaves fingerprints on the interior. There is no indication of fingerprints on the interior of the window, there is no indication of fingerprints on the ledge inside." (RT p. 123:24-28.) If Davis had merely touched the window and had not entered the apartment, there would not have been a trespass because Penal Code Section 602.5 requires the actor to enter the building to be guilty of trespass. Davis' attorney argued that the evidence did not

show such entry. There was no need to instruct because the evidence did not substantially support a request for a trespass instruction. The failure to give an instruction on trespass did not violate Davis' federal constitutional rights.

6. Prosecutorial Misconduct

The prosecutor began his closing argument with these remarks:

> I find myself up here even more quickly than I thought I would in closing argument. [¶] It was only this morning, after all, I guess at about 9:30 or 9:45 that I made an opening statement to you in which I said essentially that the facts would show this is a fingerprint burglary of a residence and the case is now over as far as any evidence is concerned. [¶] You will never hear -- you will never hear another witness testify in this case. You will never see another exhibit in this case except for the seven or so, perhaps eight exhibits that I introduced in this matter. There will be no more. We now come to that stage in the case where it is for you to decide what these facts show based on the law that Judge McCabe is going to give.

Davis contends that the remarks constituted *Griffin* error.

Where a prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, or to treat the defendant's silence as substantive evidence of guilt, the defendant's privilege against compulsory self-incrimination is violated. *Griffin v. California*, 380 U.S. 609, 615 (1965). While it is proper for the prosecution to address the defense arguments, a comment is impermissible if it is manifestly intended to call attention to the defendant's failure to testify, or is of such a character that the jury would naturally and necessarily

take it to be a comment on the failure to testify. *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987) (citing *United States v. Bagley*, 772 F.2d 482, 494 (9th Cir. 1985), *cert. denied*, 475 U.S. 1023 (1986)). However, such commentary by the prosecutor requires reversal only if "(1) the commentary is extensive; (2) an inference of guilt from silence is stressed to the jury as a basis for the conviction; and (3) where there is evidence that could have supported acquittal." *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993) (citation omitted), *cert. denied*, 510 U.S. 1191 (1994).

There is no reasonable likelihood that the prosecutor's comments quoted above would have been interpreted by the jury as a comment on Davis' failure to testify. There was no *Griffin* error. Davis apparently would agree with this assessment, as he apparently abandoned this claim at page 16 of his Reply filed July 31, 1997.

CONCLUSION

Davis is not entitled to federal habeas relief on the ineffective assistance of trial counsel, sufficiency of the evidence, failure to permit Officer Sirgussa to testify, jury instruction error, or prosecutorial misconduct claims. However, he is entitled to federal habeas relief on the claim that he received ineffective assistance of appellate counsel in state court. Accordingly, the petition for writ of habeas corpus is GRANTED. Davis' conviction shall be vacated unless the State of California allows petitioner to take a delayed appeal within **ninety days** of the date of this order.

Respondent's motion for summary judgment is DENIED because he has not shown that he is entitled to judgment as a matter of law in this action.

IT IS SO ORDERED.

DATED: 3/24/98

/s/
Marilyn Hall Patel
United States District Judge

APPENDIX C

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 1

FILED
Court of Appeal - First App. Dist.
MAY 13, 1995
Ron D. Barrow, Clerk

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	**No. A067374**
	)	
v.	)	
	)	**(City and County**
DWAYNE DAVIS,	)	**of San Francisco**
	)	**Super. Ct. No.**
Defendant and Appellant.	)	**156087)**
	)	

Dwayne Davis appeals from a judgment of conviction and sentence to state prison after a jury found him guilty of first degree burglary. (Pen. Code, §§ 459, 460.)[1] His counsel has raised no issues and asks this court for an independent review of the record to determine whether

1. All subsequent statutory references are to the Penal Code unless otherwise indicated.

any arguable issues exist. (*People* v. *Wende* (1979) 25 Cal.3d 436.)

Appellant was charged by information with one count of first degree burglary. The information also alleged five prior convictions: (1) first degree burglary in December 1988; (2) possession of a controlled substance in December 1988; (3) second degree burglary in September 1981; (4) second degree burglary in February 1981; and (5) receiving stolen property in July 1980. The first four were alleged both as prior serious felonies (§§ 667, subd. (a)(1), 1192.7) and as separate prison term priors (§ 667.5, subd. (b)); the fifth was alleged only as a separate prison term prior.

The evidence adduced at trial was as follows. Christy Aoki returned to her Sutter Street apartment on the evening of December 27, 1993, and discovered that it had been burglarized. Drawers and cabinets were open, clothes were strewn about, and a sliding glass door which had been locked from the inside was open. Ornamental bars over one bedroom window were bent and the window was partially open. Among the items missing from the apartment were jewelry, a computer, a VCR, a camera, a radio, and some cash. San Francisco Police Inspector Kenneth Moses processed the crime scene for fingerprints. He found appellant's fingerprints on the sliding part of the open apartment window, under the bent bars.

In proceedings outside the presence of the jury and the prosecutor, the trial court considered appellant's request to call Police Officer Peter Sirgussa to testify about a statement in his report that appellant was homeless when arrested in May 1994. Defense counsel argued that appellant's homelessness might raise the issue of whether the offense was a trespass as opposed to a burglary. But when defense counsel was unable to explain why the statement was not inadmissible hearsay, the court properly denied the request. Thereafter, the defense rested without presenting any evidence.

Appellant asked for an instruction on trespass as a lesser related offense as defined by *People* v. *Geiger* (1984) 35 Cal.3d 510. The court correctly refused to so instruct, as there was no evidentiary basis, other than an unexplainable rejection of the prosecution's evidence, from which the jury could have found the offense less than charged. (*Id.* at pp. 531-532.)

The jury found appellant guilty of first degree burglary; substantial evidence supports that determination.

A court trial was held on the priors. The prosecution presented evidence on only two of the priors, the 1988 first degree burglary and the September 1981 second degree burglary. Based on documentary evidence and the testimony of a custodian of records for the San Francisco Police Department, the court found true the allegation that the 1988 prior was a serious felony within the meaning of section 667. The trial court struck the 1981 prior, reasoning that the prosecution had not proved beyond a reasonable doubt that it was a residential burglary. The court also struck the allegation of a 1988 prior within the meaning of section 667.5, subdivision (b), based on an absence of proof.[2/]

The trial court found appellant statutorily ineligible for probation and imposed the upper term of six years. It stated proper reasons for imposing that term, i.e., appellant's numerous prior convictions and his unsatisfactory prior performance on probation and parole. It also imposed a consecutive term of five years for the prior serious felony and a $200 restitution fine. Although the reporter's transcript indicates that the court misstated the total number of days credit to which appellant was

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2. It is not clear whether the court was referring to the first degree burglary conviction or the possession of a controlled substance conviction, both of which were in 1988. There was no proof concerning service of a separate prison term on either.

entitled, both the court minutes and the abstract of judgment correctly state that total as 195 days.

Appellant has submitted a supplemental brief bringing to our attention issues he believes deserve review, but none of those issues are meritorious. We have already said that the trial court properly denied the request to call Police Officer Sirgussa and correctly refused to instruct on trespass and that substantial evidence supports the verdict. Appellant claims trial counsel should have called his own fingerprint expert or had an investigator inspect the crime scene. However, appellant has not established either that counsel's performance was deficient or that any prejudice resulted from the claimed omissions. (See *People* v. *Ledesma* (1987) 43 Cal.3d 171, 217-218.) No prosecutorial misconduct occurred. The prosecutor's statement that the jury would not hear another witness testify did not constitute an impermissible comment on appellant's failure to testify within the meaning of *Griffin* v. *California* (1965) 380 U.S. 609. Finally, because appellant did not testify, the case does not present any issue of improper impeachment with prior convictions. (See *People* v. *Collins* (1986) 42 Cal.3d 378, 383-388.)

Appellant was represented by competent counsel and received a fair hearing. There are no meritorious issues to be argued.

The judgment is affirmed.

_____

Strankman, P.J.

We concur:

_____

Stein, J.

_____

Dossee, J.

APPENDIX D

COURT OF APPEAL
FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	**No. A067374**
Plaintiff and Respondent,	)	
v.	)	**San Francisco Co. Sup. Court**
DWAYNE A. DAVIS,	)	**No. 1560878**
Respondent-Appellant.	)	

BRIEF SUBMITTED ON BEHALF OF APPELLANT IN ACCORDANCE WITH PROCEDURES OUTLINED IN *PEOPLE* V. *WENDE* (1979) 25 Cal.3d 436

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STATEMENT OF APPEALABILITY

This is an appeal from a final judgment and sentence following a jury trial, which finally disposed of all issues between the parties, and is authorized by California Penal Code section 1237.

STATEMENT OF THE CASE

In an information filed June 17, 1994, appellant Dwayne Davis was charged with one count of violation of

Penal Code[1] section 459, first degree burglary of an inhabited dwelling house with intent to commit larceny. (CT 01.)[2] The information also contained the following allegations: (1) a prior conviction for commission of a serious felony, first degree burglary, in December, 1988, within the meaning of sections 667 and 1192.7 and service of a prison sentence in connection therewith, within the meaning of section 667.5, subdivision (b); (2) a prior conviction for violation of Health and Safety Code section 11350, subdivision (a), possession of a controlled substance, in December 1988, within the meaning of sections 667 and 1192.7 and service of a prison sentence in connection therewith, within the meaning of section 667.5, subdivision (b); (3) prior conviction for violation of section 459, second degree burglary, in September 1981, within the meaning of sections 667 and 1192.7 and service of a prison sentence in connection therewith, within the meaning of section 667.5, subdivision (b); (4) a prior conviction for violation of section 459, second degree burglary, in February 1981, within the meaning of sections 667 and 1192.7 and service of a prison sentence in connection therewith, within the meaning of section 667.5, subdivision (b)[3]; and (5) service of a prison term in connection with a conviction for violation of section 496.1, receiving stolen property, in July 1980, within the meaning section 667.5, subdivision (b). (CT 1-3.)

Jury trial was conducted in this matter on August 8 through 10, 1994. (CT 16-20.) The court denied a

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1. Hereinafter, references to code sections will be to the Penal Code, unless otherwise indicated.

2. "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript, with date as necessary.

3. It is not clear from the face of the information why prior convictions two through four were charged as serious or violent felonies within the meaning of sections 667 and 1192.7.

defense motion to examine a police officer, Peter Sirgussa, who could testify that appellant was homeless at the time of his arrest, on grounds it would be inadmissible hearsay. (RT 95-97.) The defense rested without calling any witnesses. (CT 18; RT 98.)

The district attorney introduced his closing argument in the following manner:

> MR. GORDON: ... It was only this morning, after all, I guess at about 9:30 or 9:45 that I made an opening statement to you in which I said essentially that the facts would show this is a fingerprint burglary of a residence and the case is now over as far as any evidence is concerned.
>
> You will never hear -- you will never hear another witness testify in this case. You will never see another exhibit in this case . . . There will be no more. . . . (RT 99.)

The defense requested a *Geiger*[4] instruction regarding trespass as a lesser included or lesser related offense to the charged burglary. The court denied the request on grounds that it believed there was no evidence to support it. (RT 152.)

On August 10, 1994, the jury returned a verdict of guilty of first degree burglary on the single count before it. (CT 20, 53.)

A court trial was held on the prior conviction allegations on August 29, 1994, continued to September 20, 1994.[5] (RT 8/29/94 and 9/20/94, 1-18.)[6] The only

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4. *People* v. *Geiger* (1984) 35 Cal.3d 510; *People* v. *Almarez* (1985) 168 Cal.App.3d 262.

5. No clerk's minutes for these two days of trial were in the CT. Appellant's counsel requested these from the Superior Court with a

two priors for which the People offered evidence were the December 1988 first degree burglary conviction and the September 1981 second degree burglary conviction allegations. (RT 8/29/94, at p. 3.)[7] On the evidence presented consisting of a probation report, the court ordered the 1981 prior conviction allegation stricken. (RT 8/29/94 at pp. 17-18.) The December 1988 prior first degree burglary conviction allegation was found true. (RT 8/29/94 at p. 18.)

On September 20, 1994, appellant was denied probation, and sentenced to the aggravated term of six years in state prison on count one.[8] The court imposed a consecutive five-year enhancement term for the serious felony prior conviction, for an aggregate unstayed term of eleven years. The court imposed the minimum restitution fine of $200 pursuant to California Government Code section 13967, subdivision (a). (RT 9/20/94 at p. 20.)

Notice of appeal was timely filed September 26, 1994. (CT 72-73.)

STATEMENT OF FACTS

On Monday night, December 27, 1993, Christy Aoki returned to her apartment at 1440 Sutter Street in San Francisco, after an evening out for dinner and the movies,

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Rule 35(e) letter, and the clerk represented to counsel that no such minutes existed in the court's file.

6. The appellant waived his right to a jury trial on the prior conviction allegations. (RT 8/8/94 at 4-5.)

7. At sentencing, the People agreed that the 1988 section 667.5, subdivision (b) prior was not proved. Thereafter the court struck it. (RT 9/20/94 at p. 19-20.)

8. At sentencing the court considered the probation report (filed separately from the CT), and a letter from appellant requesting that the court consider sentencing him to a drug program rather than a prison term. (CT 69-70.)

to find it had been burglarized. (RT 37-40.) The drapes she normally left open had been closed and her bedroom, the kitchen, the bathrooms, and her roommate's bedroom had been ransacked. (RT 41-42.) A sliding glass door leading to a rear landing had been unlocked from the inside and was open, and the decorative bars covering her roommate's bedroom window had been forced and the small sliding window underneath partially opened. (RT 43-46.) Missing were her jewelry, a laptop computer, a number of small electronic appliances such as a Walkman tape player and an answering machine, and about $40.00 in cash, for a total loss to her of about $4,000. (RT 47-48.)

Ms. Aoki's roommate, Terri Peaker, also testified. She had been away on Christmas vacation when the burglary took place. (RT 61.) When she returned, she found that most of her jewelry, a jacket, and some ski gloves, among other things, were missing, with an approximate total value to her of $1,000. (RT 63.)

San Francisco Police Inspector Kenneth Moses processed the crime scene for fingerprints the day after the burglary. (RT 75-76.) The inspector found several usable latent fingerprints as part of a whole handprint on the outside of the window to Terri Peaker's bedroom, underneath the bent bars. (RT 78-81.) He processed the usable prints through a computer matching system known as "AFIS" (automated fingerprint identification system). The system compares prints submitted to it to the millions on file and returns the ten closest matches for examination by the inspector. (RT 82.) Through comparison of the print matches generated by AFIS with those he had submitted, Inspector Moses was able to identify the thumb and little fingerprints left at the crime scene as belonging to appellant. (RT 83.) The inspector testified that, in his professional opinion, no one else could have left those prints in that place; they are distinctive to appellant. (RT 84.)

ARGUMENT

PURSUANT TO *PEOPLE* v. *WENDE* (1979) 25 Cal.3d 436, APPELLANT REQUESTS THE COURT TO MAKE ITS OWN INDEPENDENT EXAMINATION OF THE RECORD OF APPEAL

Pursuant to the opinion of the California Supreme Court in *People* v. *Wende*, *supra*, 25 Cal.3d 436, counsel requests that this court independently review the entire record on appeal in this case.

Appellant has been advised by present counsel of his right to submit a supplemental brief in this court within a reasonable time after this brief is filed. Appellant has been advised that in the supplemental brief he may bring tot he court's attention any issues he believes deserve review. Appellant has been further advised that he may ask the court to relieve present counsel, but that counsel will retain the record for the present to allow proper representation in the event the court requests further briefing.

Present counsel has reviewed the entire record and remains available to brief any additional issues, upon the court's request.

Dated: April 12, 1995

Respectfully submitted,

/s/
Meredith J. Watts, #78520
Attorney for Appellant
DWAYNE A. DAVIS

DECLARATION OF COUNSEL, MEREDITH J. WATTS

I, Meredith J. Watts, hereby declare:

As counsel appointed to represent appellant, Dwayne A. Davis, in this appeal, I have reviewed the entire record, consisting of 101 pages of Clerk's Transcript and supplemental CT, as well as 189 pages of Reporter's Transcript. I have discussed in correspondence and on the telephone with my client my findings and his views regarding the case.

In a letter dated April 5, 1995, I advised my client of the nature of this brief; that I would serve a copy of this brief on my client; that he may file a supplemental opening brief on his own behalf; that I would remain available to brief issues as requested by the court; and that he may file a request for the court to relieve me as counsel in this appeal.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 12, 1995, in San Francisco, California.

/s/
Meredith J. Watts, #78520

Supreme Court, U.S.
FILED

No. 98-1427 981427 MAR 8 1999

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

M.C. KRAMER, Warden, *Petitioner*,

v.

DWAYNE DAVIS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX INDEX

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Order and Amended Opinion of
Ninth Circuit Court of Appeals
Amended on March 10, 1999 Supp. 1a

SUPPLEMENTAL APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DWAYNE A. DAVIS,	)	
Petitioner-Appellee,	)	**No. 98-16122**
	)	
v.	)	**D.C. No.**
	)	**CV-96-04646-MHP**
M.C. KRAMER,	)	
Respondent-Appellant.	)	**ORDER AND**
	)	**AMENDED OPINION**

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and Submitted
December 8, 1998—San Francisco, California

Filed January 26, 1999
Amended March 10, 1999

Before: Stephen Reinhardt, John T. Noonan, and
Michael Daly Hawkins, Circuit Judges

Opinion by Judge Reinhardt

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court. The court held that a state criminal appellate attorney's "no-merit brief" that satisfies the state law standard may still violate the appellant's federal constitutional right to effective assistance of counsel on appeal.

In appellee Dwayne Davis's appeal from his criminal conviction, appellate counsel filed a "no-merit brief" in accordance with the standards prescribed by the California Supreme Court in its "*Wende*" decision. The brief did not identify any possibly meritorious arguments or point to anything in the record that might have warranted an appeal. Counsel merely requested that the appellate court independently review the record.

Davis filed an appellate brief on his own behalf, contending that his trial attorney had provided ineffective legal assistance. The California Court of Appeal affirmed. The California appellate courts also denied Davis's habeas corpus petitions asserting ineffective assistance of trial and appellate counsel.

On federal habeas corpus, Davis again raised claims of ineffective trial and appellate counsel. Additionally, he asserted that the evidence was insufficient to support his conviction, and that the trial court erred by failing to instruct the jury on a lesser-included offense.

The district court granted Davis's petition, concluding that he had been denied the effective assistance of appellate counsel because the appellate attorney's submission of a *Wende* brief failed to satisfy the federal constitutional standards set forth in *Anders v. California*,

386 U.S. 738 (1967) and *Penson v. Ohio*, 488 U.S. 75 (1988). On the merits of Davis's claims, the court ruled that they did not provide any basis for federal habeas relief.

Anders held that criminal appellate counsel's submission of a "no-merit brief" does not satisfy the attorney's constitutionally mandated responsibility to act as an active advocate for the appellant, and deprives him of his right to counsel on appeal. In *Penson*, the court held that no showing of prejudice is required when there is an *Anders* violation.

On appeal, the State contended that the district court's decision did not comply with the requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA) because it was not supported by clearly established federal law, as determined by the Supreme Court; the district court erred in granting the petition without determining that Davis was prejudiced by appellate counsel's performance; that *Penson* did not control because Davis's appellate attorney did not formally withdraw; and that because the district court denied Davis's petition on the underlying claims, Davis could not vindicate any federal right by returning to state court for a fresh appeal.

[1] Anders established that a no-merit brief such as the one filed by Davis's appellate attorney does not satisfy federal constitutional standards. The state court decision was contrary to clearly established federal law as determined by the Supreme Court. Davis's counsel left Davis to shift entirely for himself, and thereby failed to fulfill the role of an active advocate required by the Constitution. Under *Anders* Davis was entitled to a fresh appeal. The California court's denial of Davis's writ was contrary to *Anders* and, in this regard, the district court's decision comported with the AEDPA.

[2] The legal principles established in *Anders* and *Penson* extend to cases in which appellate counsel does not formally withdraw. It is appellate counsel's failure to conform with *Anders*, irrespective of counsel's decision to formally withdraw, that leaves the defendant entirely to his own devices, and entirely without representation. Where the appellate attorney does not formally withdraw, but fails to comport with *Anders*, it amounts to an unreasonable application of clearly established federal law, as determined by the Supreme Court.

[3] The district court's denial of Davis's petition on his underlying claims indicated nothing more than the court's conclusion that the state court's rejection of those claims was not contrary to federal law. In a direct appeal, the state court would apply an entirely different standard of review. For this reason, Davis might vindicate his federal rights by returning to state court for a fresh appeal. [4] Where a defendant suffers a violation of *Anders*, he need not show prejudice. He certainly need not show that he will prevail on appeal. Davis was entitled to a fresh state-court appeal.

COUNSEL

Seth K. Schalit, Deputy Attorney General, San Francisco, California, for respondent-appellant M.C. Kramer.

Steven Kalar, Assistant Federal Public Defender and Geoffrey A. Hansen, Chief Assistant Federal Public Defender, San Francisco, California, for petitioner-appellee Davis.

ORDER

The request of the Federal Public Defenders for the Central and Eastern Districts of California for leave to file a brief of amicus curiae is **GRANTED.**

The Opinion is amended as follows:

(1) At Slip Op. 638, the first paragraph is amended to read as follows:

The two terms, read together, delineate the range of cases that warrant federal habeas relief under § 2254(d)(1). The terms overlap, and cases may fall into one or both classifications, depending on the circumstances. No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other. Their purpose is the same: to ensure the objective that state courts follow controlling Supreme Court law.[FN7] For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.[FN8]

(2) Footnote 7 is amended as follows:

The first sentence will remain unchanged. The remainder of the footnote will read:

> While this is certainly true in some instances, in the *Moore* footnote we did not attempt a complete definition of these statutory terms, or set forth an inflexible rule. Nor do we here. We leave the terms with the full flexibility and potential for interchange with which we found them.

OPINION

REINHARDT, Circuit Judge:

The state of California appeals the district court's order granting Dwayne Davis a writ of habeas corpus. We must determine whether the California courts' denial of Davis' state habeas petition, in which Davis alleged that his appellate counsel failed to satisy the constitutional requirements of *Anders v. California*, 386 U.S. 738 (1967), was "contrary to" or an "unreasonable application of" clearly established federal law. *See* 28 U.S.C. § 2254(d). Because we conclude that it was, we affirm the decision of the district court that the writ issue.

I.

In 1994, following a jury trial, Davis was convicted of first degree burglary. He was sentenced to eleven years in prison. In his appeal, Davis' appellate attorney limited her representation to filing a "no-merit brief" pursuant to the standards enunciated by the California Supreme Court in *People v. Wende* 600 P.2d 1071 (Cal. 1979). The brief merely recited the procedural history and facts of the case. Not only did the brief fail to identify any possibly meritorious arguments, it flatly failed to point to anything in the record that might have warranted an appeal. The brief simply lodged a request that the court "independently review the entire record on appeal in this case."

Following his attorney's submission of this brief, Davis filed an appellate brief on his own behalf. He argued, *inter alia*, that his trial counsel was ineffective for failing to hire an independent fingerprint expert and for failing to conduct an investigation of the crime scene, and that the trial court erred in failing to instruct on a lesser included offense. In an unpublished decision, the California Court of Appeal affirmed the judgment of conviction.

In 1996, Davis filed pro se petitions for a writ of habeas corpus in California Superior Court, the California Court of Appeal, and the California Supreme Court. In each, he raised claims of ineffective assistance of trial and appellate counsel. Each court denied Davis' petition. The California Supreme Court summarily denied Davis' final petition in May of 1996. In December of 1996, Davis filed a pro se petition for a writ of habeas corpus in federal district court. In his federal petition, Davis again raised claims of ineffective assistance of trial and appellate counsel. He also argued, *inter alia*, that the evidence was insufficient to support his conviction, and that the trial court erred by failing to instruct the jury on the lesser included offense of trespass.

The district court granted Davis a writ. The court held that Davis had been denied the effective assistance of appellate counsel because that counsel's submission of a "*Wende*" brief, which raised no issues for appeal and pointed to no part of the record that might warrant such an appeal, failed to satisfy the federal constitutional standards enunciated in *Anders* and *Penson v. Ohio*, 488 U.S. 75 (1988). It then denied all of Davis' remaining claims.

II.

The state's primary argument in this appeal is that the district court's decision does not comport with the requirements of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). AEDPA wrought a number of changes in the statute governing habeas corpus proceedings by persons convicted of state offenses. Under § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

> on the merits in State court proceedings unless the adjudication of the claim —
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

The state contends that the district court's decision was not supported by clearly established federal law, as determined by the United States Supreme Court, and was therefore improper. We reject the state's argument.[1]

In *Anders*, 386 U.S. at 739, the defendant had been convicted of felony possession of marijuana. On appeal, Anders' court-appointed counsel concluded that any appeal would lack merit and so notified the court in a letter brief. Other than informing him of his right to file a pro se brief, Anders' counsel failed to do anything else on his behalf. *See id.* at 739-40.

The Court delineated a court-appointed appellate counsel's duty to represent his client after "determin[ing] that there is no merit to the indigent's appeal." It began its analysis by reaffirming indigent defendants' right to counsel on appeal. The Court noted that it had "consistently held invalid those procedures 'where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.'" *Id.* at 741 (*quoting Douglas v. California*, 372

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1. The district court noted that Davis' petition was subject to the requirements of § 2254(d). The court correctly held that "under AEDPA, the petition may not be granted . . . unless the state court's adjudication of the claim: '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.'"

U.S. 353, 358 (1963)). It then wrote that this "constitutional requirement of substantial equality and fair process" is only realized where the court-appointed counsel "acts in the role of an active advocate in behalf of his client." *Anders*, 386 U.S. at 744. In no uncertain terms, the court held that when appellate counsel simply submits a "no-merit letter," such as the one submitted by Anders' appellate counsel, he does not fulfill his constitutionally mandated responsibility to act in the "role of an active advocate." The court held that the submission of a no-merit letter is simply not "an adequate substitute for the right to full appellate review." *Id.* at 742 (quoting *Eskridge v. Washington State Bd.*, 357 U.S. 214, 215 (1958)).

The *Anders* Court then explained the procedure, required by the constitution, that an appellate counsel *must* follow if he determines that an appeal would be frivolous:

> [I]f counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal . . . .

Anders, 386 U.S. at 744.

Significantly, *Anders* goes on to hold that when an appellate attorney fails to comply with these constitutional

standards, and merely files a no-merit brief of the sort filed on behalf of Anders, the defendant is deprived of his right to counsel on appeal. *See id.* at 745. In the Court's words, where counsel files a no-merit brief that does not comport with these standards, the defendant is left to "shift *entirely* for himself." *Id.* (*emphasis added*).

In *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), we applied *Anders* to a case factually indistinguishable in all relevant respects from the case at bar. Although *Robbins* was a pre-AEDPA case, because our decision there was simply an application of *Anders, Robbins'* reasoning is equally applicable in AEDPA cases.

In *Robbins*, defendant's appellate counsel filed a "no-merit brief" pursuant to *People v. Wende*, 600 P.2d at 1074. *Robbins*, 152 F.3d at 1064. The brief filed in *Robbins* was indistinguishable from the brief filed by Davis' appellate counsel here: it "briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues." *Id.* As here, Robbins filed an appellate brief on his own behalf, but his appeal was unsuccessful. As here, the district court granted Robbins' petition for a writ of habeas corpus, holding that Robbins' appellate counsel had failed to satisfy the requirements established in *Anders*.

The state argued in *Robbins*, as it does here, that because the no-merit brief complied with the standards enunciated by the California Supreme Court in *Wende*, the district court erred in determining that the brief was insufficient under *Anders*. *Robbins*, 152 F.3d at 1066.[2/]

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2. Under *Wende*, an appellate attorney may file a brief that merely "set[s] forth a summary of the proceedings and facts with citations to the transcript, raise[s] no specific issues, and call[s] upon the court to make a thorough review of the record to determine for itself whether there were any arguable issues." 600 P.2d at 1074. The

The *Robbins* court expressly rejected the state's argument. *Id.* at 1066-67. Relying on "the United States Supreme Court's requirements set forth in *Anders*," the court held that, despite the fact that the no-merit brief complied with *Wende*, the requirements of *Anders* "were not met." *Id.* at 1067. As the court wrote:

> The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court 'independently review the entire record for arguable issues.' Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.
>
> *Id.*[3]

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nonexistence of arguable issues, moreover, may be inferred from counsel's failure to raise any, and counsel need not withdraw unless he explicitly describes the defendant's case as "frivolous." *Id.* at 1075.

3. In *United States v. Griffey*, 895 F.2d 561, 562 (9th Cir. 1990), we held similarly that a brief, which satisfied the requirements of *Wende*, failed to comport with the constitutional requirements of *Anders*. The brief at issue in *Griffey* was, again, indistinguishable from the brief filed by Davis' counsel. The *Griffey* brief: "summarized the proceedings in the district court, recited the facts of the case, and stated that counsel had reviewed the record and 'located no specific issues' for appeal." *Id.* As here, counsel in *Griffey* "did not say the appeals were frivolous and did not move to withdraw," but asked the court to review the record. *Id.* Our holding in *Griffey* that the brief was inadequate was based entirely on Supreme Court precedent, namely *Anders*. Because, as *Anders* dictates, a brief must refer "to anything in the record that might arguably support the record," we held in *Griffey* that an attorney who files a *Wende* brief that fails to do so fails to fulfill his role as advocate, and leaves the defendant to "shift entirely for himself." *See id.* (*quoting Anders*, 386 U.S. at 744).

There would be no question that the case at bar is controlled by *Robbins* if this were a pre-AEDPA case. Again, the no-merit brief filed by Davis' appellate counsel is indistinguishable from the brief at issue in *Robbins*: both briefly summarized the procedural and factual histories of the cases, and requested that the state appellate court independently review the entire record for arguable issues. It is equally obvious, however, that in *Robbins* we were applying "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d), namely *Anders v. California. Robbins* was, in fact *nothing more* than an application of *Anders* to facts indistinguishable from those presented here. In reaching its holding, the *Robbins* court wrote that "[o]ur obligation . . . is to determine whether appellate counsel met his obligations *under the United States Supreme Court's requirements set forth in Anders and its progeny*." *Robbins*, 152 F.3d at 1066-67 (emphasis added). The court's conclusion was that although a *Wende* brief had been filed, "the district court correctly found that *Robbins's counsel did not comply with Anders.*" *Id.* at 1067 (emphasis added). Finally, the court concluded that "the outcome of Robbins's case was *predetermined* by the controlling analysis provided by the Supreme Court in *Anders* . . . ." *Id.* at 1068 (emphasis added).

[1] As *Robbins* makes clear, *Anders* clearly establishes that a no-merit brief such as the one filed by Davis' appellate attorney does not satisfy federal constitutional standards. Here, the state court decision we review is "contrary to . . . clearly established Federal law, as determined by the Supreme Court." As in *Anders*, Davis' counsel left Davis to "shift entirely for himself," and thereby failed to fulfill the "role of an active advocate" required by the constitution. *Anders*, 386 U.S. at 745, 744. Under *Anders*, Davis is entitled to a fresh appeal. The California court's denial of davis' writ on his claim of ineffective assistance of appellate counsel is contrary to

Anders and in this regard, the District Court's decision comports with AEDPA.[4]

III.

The state next argues that the district court erred in granting petitioner a writ without determining that Davis was prejudiced by his appellate counsel's performance.[5] In *Penson v. Ohio*, 488 U.S. 75 (1988), the Supreme Court considered the question whether a petitioner who suffers ineffective assistance under *Anders* must also show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). In *Penson*, petitioner's appellate counsel, like Davis' appellate counsel here, filed a no-merit brief. 488 U.S. at 77-78. The attorney then requested, and was granted, leave to withdraw from the case. As the Court wrote, "counsel was permitted to withdraw before the court reviewed the record on nothing more than a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief." *Id.* at 78. The state court subsequently granted petitioner 30 days in which to file an appellate brief pro se, but denied petitioner's request for the appointment of a new

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4. In *Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997), the court held that *Faretta v. California*, 422 U.S. 806 (1975) "clearly established" a rule of law regarding the timeliness of a request for self-representation. In dicta, the *Moore* court suggested that the timeliness rule was "necessary to the [*Faretta*] Court's decision, and therefore is a holding of the Court." *Moore*, 108 F.3d at 265. *Moore* does not establish a requirement that a rule be "necessary" to a Supreme Court "holding" in order to clearly establish Federal law. It merely points out that such was the case with respect to *Faretta*.

5. In its brief, the state also argues that the district court failed to determine whether counsel was "incompetent." By failing to comply with the requirements of *Anders*, counsel's performance failed to comport with constitutional standards. *See Anders*, 386 U.S. at 738. No separate *Strickland* competence analysis is called for when counsel fails to comply with *Anders*.

attorney. *See id.* The state court of appeals affirmed petitioner's conviction.[6]

The *Penson* Court first reiterated the holding of *Anders*, that "a criminal appellant may not be denied representation on appeal based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Id.* at 80. It then held that "[c]ounsel's failure to file such a brief left the Ohio court without an adequate basis for determining that he had performed his duty carefully to search the case for arguable error and also deprived the court of the assistance of an advocate in its own review of the cold record on appeal." *Id.* at 82. The state in *Penson*, argued, however, that even if the court had erred in granting appellate counsel's motion to withdraw and in failing to appoint new counsel, petitioner failed to show prejudice under *Strickland* and therefore the state court's affirmance of Penson's conviction was not in error.

The *Penson* Court completely rejected the claim that a showing of prejudice was required. As the Court wrote, requiring a showing of prejudice in cases such as this:

> would leave indigent criminal appellants without any of the protections afforded by *Anders*. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant

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6. The court actually reversed petitioner's conviction on one count, on the ground that the trial court had given an erroneous jury instruction. *See Penson*, 488 U.S. at 79. It affirmed on all other counts noting that the petitioner had "'suffered no prejudice' as a result of 'counsel's failure to give a more conscientious examination of the record' because the court had thoroughly examined the record and had received the benefit of arguments advanced by counsel for petitioner's two codefendants." *Id.*

> suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protections afforded by *Douglas* and *Anders*.

488 U.S. at 86.

The state argues that *Penson* cannot control this case because in *Penson*, unlike in the case before us, the appellate counsel formally withdrew. According to the state, unless appellate counsel formally withdraws, the defendant is not "without representation," *id.* at 88, and thus it is inappropriate to apply *Penson's* rule of presumed prejudice. We conclude, however, that while there is indeed a difference between *Penson* and the present case, a failure to apply *Penson* here would amount to an "unreasonable application of" clearly established federal law for purposes of 28 U.S.C. § 2254(d).

To date, we have not defined the term "unreasonable application" as used in § 2254(d), nor have we explained the difference between "contrary to" and "unreasonable application of," as used in that section. Clearly, however, both terms reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court. Moreover, as some other circuits have correctly pointed out, the statutory terms are not amenable to a rigid distinction, *see, e.g., O'Brien v. DuBois*, 145 F.3d 16, 22 (1st Cir. 1998), and have "overlapping meanings," *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998).

The two terms, read together, delineate the range of cases that warrant federal habeas relief under §

2254(d)(1). The terms overlap, and cases may fall into one or both classifications, depending on the circumstances. No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other. Their purpose is the same: to ensure the objective that state courts follow controlling Supreme Court law.[7] For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.[8]

[2] It is true, as the state points out, that in *Penson* the appellate counsel formally withdrew from representing the petitioner, while in this case Davis' appellate counsel did not formally withdraw. *Anders*, 386 U.S. at 745. The legal principles established in *Anders* and *Penson*, however, extend to cases in which appellate counsel does not

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7. In a footnote in *Moore v. Calderon*, 108 F.3d 261, 265 n.3 (9th Cir. 1997), we stated in dicta that the "contrary to" test applies to questions of law, while the "unreasonable application" test applies to mixed questions of fact and law. While this is certainly true in some instances, in the *Moore* footnote we did not attempt a complete definition of these statutory terms, or set forth an inflexible rule. Nor do we here. We leave the terms with the full flexibility and potential for interchange with which we found them.

8. The definition we offer here is not intended to be exhaustive. Rather, it sets forth certain circumstances in which a state court's determination amounts to an "unreasonable application." There are, of course, other circumstances comprehended by the term we construe. If, for example, a state court applies a Supreme Court precedent in a context where such application is unreasonable, the decision would amount to an unreasonable application. So too would a state court decision that, in applying federal law, simply misinterprets the relevant Supreme Court precedent. *See, e.g., Green*, 143 F.3d at 870.

formally withdraw. As noted, the *Anders* Court established the rule that when an appellate counsel files a "no-merit" brief that fails to comport with the standards enunciated in that case, he fails to fulfill his "role as advocate," and thereby leaves the defendant to "shift *entirely* for himself." *Id.* at 744, 745 (emphasis added.) Therefore, it is the appellate counsel's failure to conform with *Anders*, irrespective of counsel's decision to formally withdraw from a case, that leaves the defendant "entirely" to his own devices, and entirely without representation. It is also obvious that a defendant left to "shift entirely for himself' is a defendant left, in the words of the *Penson* Court, "completely without representation during the appellate court's actual decisional process." *Penson*, 488 U.S. at 88. Accordingly, in a case where the defendant's appellate attorney does not formally withdraw but fails, nonetheless, to comport with the requirements of *Anders*, the defendant is "completely without representation" and *Penson's* rule of presumed prejudice must be applied. A failure to apply the rule of presumed prejudice simply because the attorney has not formally withdrawn is a failure to apply the "principle of a precedent in a context where such failure is unreasonable." *Green*, 143 F.3d at 871. It therefore amounts to an "unreasonable application of" clearly established federal law, as determined by the Supreme Court.

This reading of *Penson's* reach is supported by another circuit. In *Lofton v. Whitley*, 905 F.2d 885 (5th Cir. 1990), the Fifth Circuit considered whether *Penson's* rule of presumed prejudice extended to a situation where, as here the appellate counsel had filed a deficient no-merit brief, but had not formally withdrawn from the case. As the Fifth Circuit wrote, "that counsel did not formally withdraw does not appear to be a significant distinction that would change the analysis from the presumed prejudice of *Penson* . . . . Lofton may have been formally represented by counsel, but the *failure to raise any grounds*

for appeal was the equivalent of his attorney's withdrawal." *Id.* at 888 (emphasis added). This part of the court's opinion was based entirely on *Penson* and *Anders*. Accordingly, as the Fifth Circuit confirms, even where an attorney does not formally withdraw from the case, *Anders* and *Penson* dictate that the attorney's failure to comply with the requirements of *Anders* results in the deprivation of the defendant's right to counsel. *See Anders*, 386 U.S. at 745; *Penson*, 488 U.S. at 83-85. Again, it is an unreasonable application of clearly established Supreme Court law not to extend *Penson's* rule of presumed prejudice to this circumstance.[9]

IV.

In granting Davis' writ on his claim of ineffective assistance of appellate counsel, the district court held that Davis had raised at least three arguable underlying claims:

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9. That the failure to apply a rule of presumed prejudice in this case is an "unreasonable application of" federal law is also evident from the Supreme Court's decision in *United States v. Cronic*, 466 U.S 648 (1984). In *Cronic*, decided the same day as *Strickland*, the Supreme Court enunciated conditions where *Strickland's* prejudice requirement does not apply. The Court held that there are circumstances "that are so likely to prejudice the accused" that prejudice should be presumed. *Id.* at 658. In enumerating these circumstances, the Court wrote that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659. Significantly, *Cronic* cited *Anders* for the proposition that "the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.'" *Id.* at 656 (*quoting Anders*, 386 U.S. at 743). As we know from *Anders*, when a counsel files a no-merit brief that fails to comport with the standards enunciated there, the counsel fails to act "in the role of an advocate." Accordingly, *Cronic* like *Penson*, dictates a rule of presumed prejudice in cases such as the one at bar. Failure to apply that rule amounts to an "unreasonable application of" federal law.

ineffective assistance of trial counsel, insufficiency of the evidence, and jury instruction error. Because the underlying claims were arguable, the district court held that Davis' appellate counsel should have raised them on direct appeal. The district court also conducted its own review of these same underlying claims and, under the standards enunciated in 28 U.S.C. § 2254(d), held that Davis did not "establish his entitlement to federal habeas relief" on any of them. The state argues that because the district court denied Davis' petition on the underlying claims, Davis cannot "vindicate" any federal right by returning to the state court for a fresh appeal. The state argues, in essence, that because the district court denied Davis federal habeas relief on his underlying claims, Davis should be estopped from trying to litigate these claims in a state court appeal.

[3] The state's argument is erroneous. The district court's denial of Davis' petition on his underlying claim indicates nothing more than the district court's conclusion that the state court's rejection of those claims was not contrary to federal law as established by the United States Supreme Court. In a direct appeal, the state court would apply an entirely different standard of review to Davis' claims. For this reason, regardless of the district court's ruling as to whether any of these alleged violations entitled him to habeas relief, Davis indeed may vindicate his federal rights by returning to the state court for a fresh appeal.[10/]

---

10. A heightened standard of harmless error analysis, moreover, applies in federal habeas corpus proceedings. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619 (1993). Under *Brecht*, in a federal habeas proceeding "the standard for determining whether habeas relief must be granted is whether . . . the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 623 (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

[4] Moreover, the state's argument, if accepted, would serve to import a prejudice requirement through the back door. The state asks this court to hold that Davis is not entitled to relief on his *Anders* claim because, it believes, his appeal will not succeed. As stated above, where a defendant suffers a violation of *Anders*, he need not show prejudice. He certainly need not show that he will prevail on appeal. *See, e.g., Penson*, 488 U.S. at 86. Because Davis' appellate counsel failed to comply with the constitutional requirements of *Anders*, Davis is entitled to a fresh state court appeal, irrespective of the district court's resolution of his federal habeas claim. By affording Davis this appeal, his federal right to effective assistance of counsel, enunciated in *Anders*, will be vindicated.

V.

The district court's order granting Davis a writ on the issue of ineffective assistance of appellate counsel is therefore AFFIRMED.

Supreme Court, U.S.
FILED
MAR 18 1999
CLERK

No. 98-1427

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

M.C. KRAMER, Warden, *Petitioner*,

v.

DWAYNE DAVIS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Do compelling reasons support the state's petition for a writ of certiorari when this Court has already granted a petition for writ of certiorari on another, factually indistinguishable case, and the Ninth Circuit's application of the Antiterrorism and Effective Death Penalty Act, ("AEDPA"), conflicts with no decision of another United States court of appeal?[1]

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[1] In its "Questions Presented," "Introduction to Reasons for Granting the Writ," and in footnote 1 of its Petition for Writ of Certiorari, the state introduces material outside of the record. The state repeatedly refers to statistics regarding no-merit briefs that were not presented (as argument or as admissible evidence), to either of the federal courts below. Davis accordingly moves to strike the last full sentence in the first paragraph of the Questions Presented, Cert. Petit. at i, the first sentence of the "Introduction" section, *id.* at 4, and footnote 1, *id.* at 4 n.1.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-1427

M.C. KRAMER, Warden, *Petitioner,*

v.

DWAYNE DAVIS, *Respondent.*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Dwayne Davis respectfully requests that this Court deny the petition of M.C. Kramer, Warden, ("the state"), for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of Judges Reinhardt, Noonan, and Hawkins for the Ninth Circuit Court of Appeals, Appendix A, is reported at No. 98-16122, 1999 U.S. App. LEXIS 918 (9th Cir. Dec. 8, 1998), *amended* Mar. 10, 1999. The opinion of the district court is not reported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on January 26, 1999, and amended its opinion on March 10, 1999. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

After a jury trial in San Francisco Superior Court in 1994, Mr. Davis was convicted of

first degree burglary. The court found that Davis had a prior serious felony conviction and sentenced him to eleven years in prison.

Mr. Davis was appointed counsel on direct appeal. Appellate counsel filed a brief pursuant to *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (Cal. Ct. App. 1979). Cert. Petit. App. D. Davis's counsel asked the appellate court to independently review the entire record on appeal. *Id.* at 46a. In the three-paragraph "Argument" section of this brief, counsel identified no legal issues and cited no legal authority save *Wende*. *Id.* Counsel did not seek to withdraw from her representation of Mr. Davis. *Id.*

The California Court of Appeal observed that Mr. Davis's counsel "has raised no issues." *See* Cert. Petit. App. C at 37a. Mr. Davis, however, filed a supplemental brief. Despite the lack of guidance from appellate counsel, the court considered whether a lesser-related offense instruction was warranted, *id.* at 39a, discussed the trial court's refusal to permit testimony of a police officer, *id.* at 40a, and found that substantial evidence supported the verdict, *id.* The court also discussed trial counsel's failure to call a fingerprint expert or ask an investigator to investigate the crime scene. *Id.* The court discussed, and dismissed, any claim of prosecutorial misconduct. *Id.* Finally, the court found that the case did not involve the improper use of prior convictions. *Id.* Having examined each of these issues, and after citation to controlling authority on several of these points, the court held that "[t]here are no meritorious issues to be argued." *Id.*

Mr. Davis filed a pro per petition for review with the California Supreme Court, raising the same issues presented in his supplemental brief to the Court of Appeal. ER 29-51[2]. The

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[2] The abbreviation "CR" refers to the district court record. The abbreviation "ER" refers to Respondent's Excerpts of Record.

Supreme Court denied review in July, 1995.

Mr. Davis then filed, pro per, a petition for writ of habeas corpus with the California Supreme Court alleging ineffective assistance of trial and appellate counsel. ER 54-73. The petition was summarily denied by the California Supreme Court in May, 1996. ER 53.

In December 1996, Mr. Davis filed pro per in federal district court for the Northern District of California a petition for writ of habeas corpus, under 28 U.S.C. § 2254. ER 76-110; CR 1. In his federal habeas petition, as eventually amended, Davis identified six claims of error, including ineffective assistance of appellate counsel for failure to raise any issues in the appellate brief to the California Court of Appeal. *Id.*

The state's petition for a writ of certiorari incompletely describes the holding of the district court when it states that the district court "concluded that Petitioner *was not entitled to relief* on any of the claims except for the claim of ineffective assistance of appellate counsel." Cert. Petit. at 3 (emphasis added). The district court actually held that Davis had not "establish[ed] his entitlement to *federal habeas* relief on any of the other issues raised in his petition . . . ." Cert. Petit. App. B at 25a (emphasis added). While the court found that these other issues did not meet the high standards required for federal habeas relief, the court made no reference to the prospects for the issues if raised on *state* direct appeal. Instead, the district court held that, under this Court's authority in *Anders* and *Penson*, these issues should have been identified by state appellate counsel:

> [Davis] has raised arguably nonfrivolous issues that could have been raised on appeal in the state court, *e.g.*, ineffective assistance of trial counsel, the sufficiency of the evidence and jury instruction error. Because appellate counsel failed to present these issues to the California Court of Appeals, counsel was ineffective.

Id. The district court ordered the state to permit Mr. Davis to take a delayed appeal within ninety days of its order, or his conviction would be vacated. *Id.* at 35a. The Warden appealed and obtained a stay from the court of appeals.

On January 26, 1999, the court of appeals affirmed the order granting the petition based on ineffective assistance of counsel. *See Davis v. Kramer*, No. 98-16122, 1999 WL 27487 (9th Cir. Jan. 26, 1999), Cert. Petit. App. A at 1a. The court in *Davis* reviewed the procedures required of appellate counsel, as articulated by this Court in *Anders v. California*, 386 U.S. 738 (1967). *See id.* at 4a-5a. The court observed that it had recently considered the requirements of *Anders* in another, pre-AEDPA case: *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1997), *petition for cert. granted, Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999). *Id.* at 6a. The court in *Davis* found the reasoning of *Robbins* equally applicable in AEDPA cases, because that reasoning was merely an application of this court's decision in *Anders*. *Id.* The court affirmed the district court's order granting the writ on the issue of ineffective assistance of appellate counsel. *Id.* at 17a.

The state then moved for a stay of mandate pending petition for writ of certiorari. The appellate court granted the stay on February 8, 1999.

On February 9, 1999, the federal public defenders for the Central and Eastern District of California filed a suggestion for modification of the court's opinion.

The state filed its petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit on March 3, 1999.

This Court granted the state's petition for a writ of certiorari in the *Robbins* case on

March 8, 1999. *Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999).

The Ninth Circuit court of appeals amended its decision in *Davis* on March 10, 1999. *See Davis v. Kramer*, No. 98-16122, 1999 U.S. App. LEXIS 918 (9th Cir. Jan. 26, 1999), *amended* Mar. 10, 1999, App. A. In *Davis*, the court of appeals acknowledged that the present case, unlike *Robbins*, was controlled by the AEDPA, 28 U.S.C. § 2254(d).

The court in *Davis* held that this Court's decision in *Anders* clearly established that "a no-merit brief such as the one filed by Davis's appellate attorney does not satisfy federal constitutional standards." *Davis*, 1999 U.S. App. LEXIS 918, at *12, App. A at 11a-12a. The court found that in *Davis*, as in *Anders*, appellate counsel left the defendant to "'shift entirely for himself.'" *Id.*, App. A at 12a (quoting *Anders*, 386 U.S. at 745, 744). The California court's denial of the claim on ineffective assistance of appellate counsel was, accordingly, "contrary to" *Anders*, and the district court's decision comported with the AEDPA. *Id.*

The court in *Davis* also considered whether a defendant need show prejudice to make an ineffective assistance of appellate counsel claim, when appellate counsel failed to identify any issues or request leave to withdraw. *Id.*, App. A at 12a-17a.

The court observed that the relevant provisions of the AEDPA permits a writ of habeas corpus to issue only when a state decision is "contrary to" or "involved an unreasonable application of" clearly established federal law. *Id.* at *4-*5, App. A. at 7a (quoting 28 U.S.C. § 2254(d)(1)). Other circuits, noted the court, had observed that the statutory terms were "not amenable to rigid distinction," and had "overlapping meanings." *Id.* at *16-*17, App. A. at 14a-15a (citing *O'Brien v. Dubois*, 145 F.3d 16, 22 (1st Cir. 1998), and quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)).

The Ninth Circuit in *Davis* declined to "establish a fixed division" between the terms. *Id.* at *17, App. A at 15a. The court set forth a non-exhaustive definition of "unreasonable application:" "a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision." *Id.* at *17, App. A. at 15a. The court in *Davis* disclaimed that it was not attempting "a complete definition of these statutory terms, or [to] set forth an inflexible rule." *Id.* at *17 n.7, App. A. at 15a n.7.

The Ninth Circuit reviewed this Court's analysis of prejudice in *Penson v. Ohio*, 488 U.S. 75 (1988). *Id.* at *18, App. A. at 15a. The court of appeals observed that this Court in *Penson* "completely rejected the claim that a showing of prejudice was required." *Id.* at *15, App. A at 13a.

The state attempted to distinguish this Court's reasoning in *Penson* by noting that Davis's appellate counsel had failed to seek leave to withdraw after filing a no-merits brief. *Id.* at *15-*16, App. A at 14a. In *Penson*, by contrast, appellate counsel formally withdrew. *Id.* The court in *Davis* found that this distinction did not remove the present case from the control of *Penson*. *Id.* The Ninth Circuit stated that the legal principles established by this Court in *Anders* and *Penson* "extend to cases in which appellate counsel does not formally withdraw." *Id.* at *18, App. A at 16a. The court noted that its view of *Penson*'s reach was consistent with the reasoning of the Fifth Circuit in *Lofton v. Whitley*, 905 F.2d 885 (5th Cir. 1990). *Id.* at * 20, App. A. at 16a. In *Lofton*, the Fifth Circuit concluded that "the failure to raise any grounds for appeal was the equivalent of [the defendant's] attorney's withdrawal." *Id.* at *20-*21, App. A at 16a-17a

(quoting *Lofton*, 905 F.2d at 888). The court in *Davis* held that it was "an unreasonable application of clearly established Supreme Court law not to extend *Penson*'s rule of presumed prejudice" to the circumstances when appellate counsel does not file a brief comporting with *Anders*, and fails to withdraw. *Id.* at *21, App. A at 17a.

SUMMARY OF THE ARGUMENT

No compelling reasons support the grant of the state's petition for a writ of certiorari. After the state's petition was filed in the present case, this Court granted the state's petition for a writ of certiorari in a factually indistinguishable Ninth Circuit decision involving identical substantive issues: *Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999). No factual or legal aspect of the *Davis* decision would contribute to the Court's analysis of the substantive issues already presented by *Robbins*.

Review by this Court is also not merited by the Ninth Circuit's interpretation and application of the AEDPA in *Davis*. In its writ petition the state candidly admits that the AEDPA analysis in *Davis* does not clearly conflict with the decision of any federal circuit. Rather, the court in *Davis* refers to and incorporates the reasoning of other federal circuits, and does not distinguish any federal decision. The definition of the AEDPA statutory language adopted by the court in *Davis* is non-exhaustive and case-specific, and does not represent an important federal question that warrants review by this Court.

Finally, the present case is not one of the rare examples warranting a grant of writ of certiorari when a court of appeals has misapplied a properly stated rule of law. *See* S. Ct. Rule 10.

NO COMPELLING REASONS SUPPORT THE GRANT OF THE WRIT

I. The Ninth Circuit's Application of *Anders* and Interpretation of the AEDPA Present No Compelling Reason Supporting the Grant of the Writ of Certiorari

The state has asked this Court to review *Davis* based on an issue that is currently before this Court in *Robbins*; the requirements of an *Anders* brief. The state has also sought review in light of a second issue, the interpretation of statutory language in the AEDPA. Neither of these two issues presents a compelling reason supporting the grant of the writ of certiorari.

The rules of this Court make clear that "A petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. Rule 10. The character of the reasons considered by this Court includes when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or "has decided an important federal question in a way that conflicts with a decision by a state court of last resort." *Id.* at 10(a). Another example of a reason supporting the grant of certiorari is when a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* at 10(c).

One basis for the state's petition for a writ of certiorari is an alleged "significant split of authority" created by the Ninth Circuit's view of *Anders* as stated in *Davis*. Cert. Petit. at 6-11. As did Mr. Robbins in his Opposition to the state's Petition for a Writ, Mr. Davis disputes both the existence and significance of this alleged split in authority. Mr. Davis's position is, however, largely moot: this Court has granted the state's petition in *Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999). As discussed in greater depth below, the facts of and analysis

in *Davis* would add nothing to the issues currently before this court in the *Robbins* case.

Equally unworthy of this Court's review is the Ninth Circuit's measured interpretation of the statutory language in the AEDPA. The court's definition and application of the "unreasonable application" prong of § 2254(d)(1) is not inconsistent with that of other federal circuits, and does not represent a decision on "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10 (c).

II. The Decision of the Ninth Circuit in *Davis* Presents No Issues Regarding Effective Assistance of Appellate Counsel Not Before This Court in *Robbins*

This Court has granted the state's petition for a writ of certiorari to the Ninth Circuit based upon that Circuit's decision in *Robbins*. *Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999). In regards to the substantive legal issue involved in both *Robbins* and *Davis*, the reach of *Anders* and *Penson*, the two Ninth Circuit cases are factually and legally indistinguishable. There exists no compelling reason to grant the petition for a writ of certiorari for the *Davis* opinion when *Robbins* is already before this Court.

The state incorrectly describes the Ninth Circuit as "relying" on its opinion in *Robbins* for its holding in the *Davis* case. Cert. Petit. at 3. The court in *Davis* actually observed that *Robbins* did not control *Davis*, because *Davis* was a post-AEDPA case. *Davis*, No. 16122, 1999 U.S. App. LEXIS 918, at *11, App. A at 11a. The court instead agreed with the reasoning of *Robbins* that concluded *Anders* did not permit *Wende* briefs. *Id.* at *8, App. A at 9a ("Although *Robbins* was a pre-AEDPA case, because our decision there was simply an application of *Anders*, *Robbins* reasoning is equally applicable in AEDPA cases").

While *Robbins* did not control the *Davis* decision because of the intervention of the

AEDPA, the similarities between the *Robbins* and *Davis* cases now weigh against the grant of a writ of certiorari in the *Davis* case. The court in *Davis* described how that case was "factually indistinguishable" from its decision in *Robbins v. Smith*:

> In *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), we applied *Anders* to a case factually indistinguishable in all relevant aspects from the case at bar. . . .
> . . . .
>
> In *Robbins*, defendant's appellate counsel filed a "no-merit brief" pursuant to *People v. Wende*, 600 P.2d at 1074. *Robbins*, 152 F.3d at 1064. The brief filed in *Robbins* was indistinguishable from the brief filed by Davis' appellate counsel here: it "briefly outlined the facts surrounding Robbin's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues." *Id.* As here, Robbins filed an appellate brief on his own behalf, but his appeal was unsuccessful. As here, the district court granted Robbins' petition for a writ of habeas corpus, holding that Robbins' appellate counsel had failed to satisfy the requirements established in *Anders*.
>
> The state argued in *Robbins*, as it does here, that because the no-merit brief complied with the standards enunciated by the California Supreme Court in *Wende*, the district court erred in determining that the brief was insufficient under *Anders*. *Robbins*, 152 F.3d at 1066. . . .

Davis, No. 16122, 1999 U.S. App. LEXIS 918, at *8-*9, App. A. 9a-10a.

The factual similarities between *Robbins* and *Davis* do not end at the briefs filed by state appellate counsel. In both cases, state appellate counsel did not seek to withdraw after filing the no-merit *Wende* brief. *See Robbins*, 152 F.3d at 1064, *Davis*, No. 16122, 1999 U.S. App. LEXIS 918, at *15-*16, App. A. at 14a. In *Robbins*, the district court found that at least two nonfrivolous appellate issues existed in addition to the *Anders* claim. *Robbins*, 152 F.3d at 1067. In *Davis*, the district court identified "arguably nonfrivolous issues that could have been raised on appeal in the state court, e.g. ineffective assistance of trial counsel, the sufficiency of the evidence, and jury instruction error." Cert. Petit. App. B at 25a. In both *Robbins* and *Davis* the

Ninth Circuit relied on this Court's decision in *Penson* for the presumption of prejudice arising from the constructive denial of the assistance of counsel. *Compare Robbins*, 152 F.3d at 1069 ("*Cf. Penson*, 488 U.S. at 88-89, 198 S. Ct. 346 (the actual or constructive denial of assistance of counsel is presumed to result in prejudice)") *with Davis*, No. 16122, 1999 U.S. App. LEXIS 918, at *20-*21, App. A. at 17a. ("Accordingly, as the Fifth Circuit confirms, even where an attorney does not formally withdraw from the case, *Anders* and *Penson* dictate that the attorney's failure to comply with the requirements of *Anders* results in the deprivation of the defendant's right to counsel.")

By seeking the writ in *Robbins*, the state has now successfully brought before this Court the rejection of *Anders* and *Penson* by the California Supreme Court in *Wende*. The state has identified no compelling reason why *Davis* would contribute to the Court's analysis of the issues already fully presented in *Robbins*. The state's petition for a writ of certiorari on the *Davis* opinion should accordingly be denied.

III. The Reading of the AEDPA's Statutory Language in *Davis* Conflicts With No Decision of a Federal Circuit Court, is Not An Important Federal Decision Meriting This Court's Review, and Is Not An Erroneous Application of Law

A. The Ninth Circuit's reading of the AEDPA term "unreasonable application" does not merit review by this Court

As of the date this Opposition Brief was filed, the state has not filed any comment on the *Davis* opinion as amended on May 10, 1999. Many of the objections articulated in its original petition, however, would presumably still apply to the amended opinion and will be addressed in this Opposition brief.

In a remarkably candid concession, the state admits in its writ petition that it is not "clear

how the [Ninth Circuit's definition of 'unreasonable application'] differs from those in other circuits." Cert. Petit. at 12. Mr. Davis agrees. In defining statutory language in the AEDPA, the Ninth Circuit looked to and adopted the reasoning of its sister circuits, and employed the most unambitious definition possible given the facts of this specific case. The court's unremarkable application of the statutory language does not present a compelling reason for this Court to "resolve authoritatively the meaning of 'unreasonable application' in § 2254(d)(1)." Cert. Petit. at 13.

The court in *Davis* first observed that the Ninth Circuit had yet to define the term "unreasonable application" as used in § 2254(d), and had not explained the difference between the terms "unreasonable application" and "contrary to" found in that section. *Davis*, No. 16122, 1999 U.S. App. LEXIS 918, at *16, App. A. at 14a. The court looked to the First Circuit's observation that the terms are not amenable to a rigid distinction. *Id.* at *16-*17, App. A at 14a (citing *O'Brien v. Dubois*, 145 F.3d 16, 22 (1st Cir. 1998)). The court agreed with the Fourth Circuit that the two terms have "overlapping meanings." *Id.* at *17, App. A. at 15a (quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)).

The court found it unnecessary to forge new meanings or definitions for "contrary to" and "unreasonable application of." It explained that "No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other." *Id.* The court then attributed an unremarkable goal to both terms: "to ensure the objective that state courts follow controlling Supreme Court law." *Id.* The court emphasized that "it did not attempt a complete definition of these statutory terms, or set forth an inflexible rule." *Id.* at *17 n.7, App. A at 15a n. 7. Its definition of "unreasonable application" was "not intended to be exhaustive."

Id. at *18 n.8, App. A at 15a n.8

With these many limiting caveats in hand, the court then presented its modest definition of "unreasonable application" for the case before it:

> For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one of more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.

Id. at *17, App. A at 14a.

As conceded by the state in its petition, it is "not clear how this definition differs from those in other circuits." Cert. Petit. at 12. In fact, the court turned to the analyses of the First and Fourth Circuits as it considered the interplay of the terms "contrary to" and "unreasonable application of" under the AEDPA. *See Davis*, No. 16122, 1999 U.S. App. LEXIS 918, at *16-*17, App. A at 14a-15a. In describing the "circumstances comprehended by the term" it construed, the court explicitly incorporated an example taken from the Fourth Circuit's decision in *Green v. French*. *Id.* at *18 n.8, App. A at 15a n. 8 (citing *Green*, 143 F.3d at 870).

The court in *Davis* incorporates, rather than distinguishes, the § 2254(d)(1) analyses of its sister circuits. Moreover, as the federal circuits have considered the application of the "unreasonable application" language, they have gradually moved towards a more consistent approach. *See, e.g., Nevers v. Killinger*, No. 98-1039, 1999 WL 97993, *10 (6th Cir. Mar. 1, 1999) (reconciling the standards used in the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits). The case-specific definition relied upon by the court in *Davis* does nothing to impede the evolution of a uniform definition of the term "unreasonable application," and certainly does not warrant the intervention of this Court into the process of defining the AEDPA.

B. The court in *Davis* correctly applied the "unreasonable application" test, and even if it misapplied the correctly-stated rule of law, this is not the rare case where a writ of certiorari is warranted.

After conceding that there is no real split in authority over the definition of "unreasonable application," the state then argues that "[e]ven if the Ninth Circuit's interpretation were correct, the court's application of the test was not." Cert. Petit. at 13. Specifically, the state attempts to distinguish *Penson* from *Davis*, based on the existence of "arguable issues" in the former case and their (asserted) absence in the latter.

The state's position is troubling in two respects: it ignores the rules of this Court, and it fails to acknowledge that the federal district court and the Ninth Circuit found "arguable issues" in the present case.

The state's petition makes no reference to Supreme Court Rule Ten. This rule cautions that "A petition for a writ of certiorari is *rarely granted* when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10 (emphasis added). If, as the state posits, the Ninth Circuit correctly defined "unreasonable application," but incorrectly applied the term to the facts of the case in *Davis*, the state's petition for a writ of certiorari should not be granted.

Of equal concern is the state's characterization of this Court's decision in *Penson*. The linchpin of the state's argument that the Ninth Circuit incorrectly applied the "unreasonable application" test is an attempt to distinguish *Penson* from the present case. In its petition for a writ of certiorari, the state emphasizes that, "*Penson* involved *a complete denial of counsel* on appeal *when the reviewing court found arguable issues*." Cert. Petit. at 14 (emphasis in original). The state attempts to distinguish the present case, because "[h]ere, counsel did not withdraw

before the court reviewed the record, *and* the court did not find any arguable issues." *Id.* (emphasis in original). *See also id.* at 15 ("And *because the court found no arguable issues*, Davis, unlike the defendant in *Penson*, had no right to adversary representation") (emphasis added).

The state's argument is incorrect in two respects. First, the state ignores the presumption of prejudice for failure to comply with *Anders*, clearly articulated by this Court in *Penson*. *See Penson*, 488 U.S. at 86. ("The primary difficulty with the State's argument [that a defendant must show prejudice under *Strickland* and counter the harmless error test of *Chapman*] is that it proves too much").

Second, even if the defendant was required to show the existence of "arguable issues" under *Penson*, the state grafts onto that case a limitation that *only* the state appellate court can determine the existence of these issues. In so doing, the state ignores the fact that in *Anders* the state appellate court had found no issues of merit; a finding that did not prevent this Court from identifying the arguable issue of improper comments by the trial judge and prosecutor on the defendant's failure to testify. *Anders*, 386 U.S. at 743. In the present case, as in *Anders*, a federal court found arguable issues where the state court had found none.

While the federal district court in *Davis* did not find error permitting federal habeas relief, it did identify at least three arguable issues that could have been raised on direct appeal before the state court:

> Although Davis does not establish his entitlement to federal habeas relief on any of the other issues raised in his petition, he has raised arguably nonfrivolous issues that could have been raised on appeal in the state court, *e.g.*, ineffective assistance of counsel, the sufficiency of the evidence, and jury instruction error.

Davis, No. C 96-4646 MHP (N.D. Cal. Mar. 25, 1998), Cert. Petit. App. B at 25a.

The Ninth Circuit noted that the district court had identified arguable underlying claims:

> In granting Davis' writ on his claim of ineffective assistance of appellate counsel, the district court held that Davis had raised at least three arguable underlying claims: ineffective assistance of trial counsel, insufficiency of the evidence, and jury instruction error.

Davis, 1999 U.S. App. LEXIS 918, at *22, App. A at 17a.

Mr. Davis agrees with the court of appeals that the existence of arguable issues is ultimately irrelevant: as stated in the Ninth Circuit's opinion, *Penson* acknowledged the presumption of prejudice when the procedures of *Anders* are not followed. *Davis*, No. 98-16122, 1999 U.S. App. LEXIS 918, at *20-*21, App. A at 16a-17a. Even if, however, Davis is required to identify arguable issues, in its writ petition the state failed to report that two reviewing courts, the federal district court and the Ninth Circuit Court of Appeals, have in fact done so. *See* Cert. Petit. at 3 (failing to report in the "Statement of the Case" section that the district court had identified arguably nonfrivolous issues); Cert. Petit. at 13-15 (failing to report that the district court and the Ninth Circuit had identified arguably nonfrivolous issues).

The state presumably intended to argue that the district court erred when it found the existence of arguable issues in Mr. Davis's petition for a writ of habeas corpus, and that the appellate court erred when it did not reverse that finding. Notably, that is precisely the argument the state articulated in its briefing to the Ninth Circuit: "The district court also erred when it concluded that because Petitioner had raised 'arguably nonfrivolous issues that could have been raised on appeal in the state court' counsel was ineffective." *State's Opening Brief on Appeal* at 21. If the state in fact intended to revist this argument previously made before the Ninth Circuit,

it now presents an issue not appropriate for this Court's review. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

The state's challenge to the Ninth Circuit's interpretation and application of the AEDPA is, in the final analysis, an attempted second bite at the *Robbins* substantive apple. The state has identified nothing in the Ninth Circuit's interpretation of the statutory term "unreasonable application" that merits this Court's review. Instead, the state uses the AEDPA issues as a means to again urge this Court to review the Ninth Circuit's approach towards *Wende* and *Anders*. This battle, the state has won: this Court has granted the writ of certiorari in *Robbins*. There remains no compelling reason for the state to again bring the identical substantive issues before this Court in *Davis*, or to place the identical issues before this Court yet again in the guise of an AEDPA analysis.

Developments that have arisen since the state filed its petition for a writ of certiorari on March 3, 1999 have undercut any reasons that might have supported review of the *Davis* decision. Should this Court wish to address the definition of "contrary to" and "unreasonable application of" in 28 U.S.C. § 2254(d)(1), there are cases whose treatments of the terms are far more ambitious and sweeping and that would serve as a better vehicles for review. *See, e.g., Nevers v. Killinger*, No. 98-1039, 1999 WL 97993 (6th Cir. Mar. 1, 1999) (gathering the § 2254(d)(1) analyses of the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits and reconciling their definitions of 'unreasonable application.'").[3] Should this Court wish to revisit and reaffirm its decisions in *Anders* and *Penson*, it currently has all of the *Davis* substantive

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[3] *Nevers* was filed two days before the state's writ petition, but was not cited in its brief.

issues before it in the form of the *Robbins* decision. *See Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999). In light of the more comprehensive AEDPA analysis of *Nevers*, and this Court's stated intention to review *Robbins*, no compelling reason remains to grant the state's petition for a writ of certiorari in the present case.

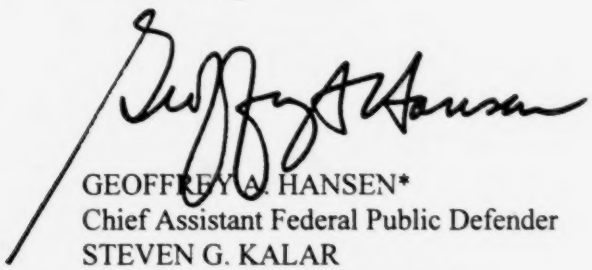
CONCLUSION

For the foregoing reasons, the state's petition for a writ of certiorari should be denied.

Dated: March 18, 1999

Repectfully submitted,

BARRY J. PORTMAN
Federal Public Defender



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Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DWAYNE A. DAVIS, *Petitioner-Appellee,* v. M. C. KRAMER, *Respondent-Appellant.*	No. 98-16122 D.C. No. CV-96-04646-MHP ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and Submitted
December 8, 1998—San Francisco, California

Filed January 26, 1999
Amended March 10, 1999

Before: Stephen Reinhardt, John T. Noonan, and
Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court. The court held that a state criminal appellate attorney's "no-merit brief" that satisfies the state law standard may still violate the appellant's federal constitutional right to effective assistance of counsel on appeal.

In appellee Dwayne Davis's appeal from his criminal conviction, appellate counsel filed a "no-merit brief" in accordance with the standards prescribed by the California Supreme Court in its "*Wende*" decision. The brief did not identify any possibly meritorious arguments or point to anything in the record that might have warranted an appeal. Counsel merely requested that the appellate court independently review the record.

Davis filed an appellate brief on his own behalf, contending that his trial attorney had provided ineffective legal assistance. The California Court of Appeal affirmed. The California appellate courts also denied Davis's habeas corpus petitions asserting ineffective assistance of trial and appellate counsel.

On federal habeas corpus, Davis again raised claims of ineffective trial and appellate counsel. Additionally, he asserted that the evidence was insufficient to support his conviction, and that the trial court erred by failing to instruct the jury on a lesser-included offense.

The district court granted Davis's petition, concluding that he had been denied the effective assistance of appellate counsel because the appellate attorney's submission of a *Wende* brief failed to satisfy the federal constitutional standards set forth in *Anders v. California*, 386 U.S. 738 (1967) and *Penson v. Ohio*, 488 U.S. 75 (1988). On the merits of Davis's claims, the court ruled that they did not provide any basis for federal habeas relief.

Anders held that criminal appellate counsel's submission of a "no-merit brief" does not satisfy the attorney's constitutionally mandated responsibility to act as an active advocate for the appellant, and deprives him of his right to counsel on appeal. In *Penson*, the court held that no showing of prejudice is required when there is an *Anders* violation.

On appeal, the State contended that the district court's decision did not comply with the requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA) because it was not supported by clearly established federal law, as determined by the Supreme Court; the district court erred in granting the petition without determining that Davis was prejudiced by appellate counsel's performance; that *Penson* did not control because Davis's appellate attorney did not formally withdraw; and that because the district court denied Davis's petition on the underlying claims, Davis could not vindicate any federal right by returning to state court for a fresh appeal.

[1] *Anders* established that a no-merit brief such as the one filed by Davis's appellate attorney does not satisfy federal constitutional standards. The state court decision was contrary to clearly established federal law as determined by the Supreme Court. Davis's counsel left Davis to shift entirely for himself, and thereby failed to fulfill the role of an active advocate required by the Constitution. Under *Anders* Davis was entitled to a fresh appeal. The California court's denial of Davis's writ was contrary to *Anders* and, in this regard, the district court's decision comported with the AEDPA.

[2] The legal principles established in *Anders* and *Penson* extend to cases in which appellate counsel does not formally withdraw. It is appellate counsel's failure to conform with *Anders*, irrespective of counsel's decision to formally withdraw, that leaves the defendant entirely to his own devices, and entirely without representation. Where the appellate attorney does not formally withdraw, but fails to comport with *Anders*, it amounts to an unreasonable application of clearly established federal law, as determined by the Supreme Court.

[3] The district court's denial of Davis's petition on his underlying claims indicated nothing more than the court's conclusion that the state court's rejection of those claims was not contrary to federal law. In a direct appeal, the state court

would apply an entirely different standard of review. For this reason, Davis might vindicate his federal rights by returning to state court for a fresh appeal. [4] Where a defendant suffers a violation of *Anders*, he need not show prejudice. He certainly need not show that he will prevail on appeal. Davis was entitled to a fresh state-court appeal.

COUNSEL

Seth K. Schalit, Deputy Attorney General, San Francisco, California, for respondent-appellant M. C. Kramer.

Steven Kalar, Assistant Federal Public Defender and Geoffrey A. Hansen, Chief Assistant Federal Public Defender, San Francisco, California, for petitioner-appellee Davis.

ORDER

The request of the Federal Public Defenders for the Central and Eastern Districts of California for leave to file a brief of amicus curiae is **GRANTED**.

The Opinion is amended as follows:

(1) At Slip Op. 638, the first paragraph is amended to read as follows:

> The two terms, read together, delineate the range of cases that warrant federal habeas relief under § 2254(d)(1). The terms overlap, and cases may fall into one or both classifications, depending on the circumstances. No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other. Their purpose is the same: to ensure the objective that state

courts follow controlling Supreme Court law.[FN7] For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.[FN8]

(2) Footnote 7 is amended as follows:

The first sentence will remain unchanged. The remainder of the footnote will read:

> While this is certainly true in some instances, in the *Moore* footnote we did not attempt a complete definition of these statutory terms, or set forth an inflexible rule. Nor do we here. We leave the terms with the full flexibility and potential for interchange with which we found them.

OPINION

REINHARDT, Circuit Judge:

The state of California appeals the district court's order granting Dwayne Davis a writ of habeas corpus. We must determine whether the California courts' denial of Davis' state habeas petition, in which Davis alleged that his appellate counsel failed to satisfy the constitutional requirements of *Anders v. California*, 386 U.S. 738 (1967), was "contrary to" or an "unreasonable application of" clearly established federal law. *See* 28 U.S.C. § 2254(d). Because we conclude that it was, we affirm the decision of the district court that the writ issue.

I.

In 1994, following a jury trial, Davis was convicted of first degree burglary. He was sentenced to eleven years in prison. In his appeal, Davis' appellate attorney limited her representation to filing a "no-merit brief" pursuant to the standards enunciated by the California Supreme Court in *People v. Wende*, 600 P.2d 1071 (Cal. 1979). The brief merely recited the procedural history and facts of the case. Not only did the brief fail to identify any possibly meritorious arguments, it flatly failed to point to anything in the record that might have warranted an appeal. The brief simply lodged a request that the court "independently review the entire record on appeal in this case."

Following his attorney's submission of this brief, Davis filed an appellate brief on his own behalf. He argued, *inter alia*, that his trial counsel was ineffective for failing to hire an independent fingerprint expert and for failing to conduct an investigation of the crime scene, and that the trial court erred in failing to instruct on a lesser included offense. In an unpublished decision, the California Court of Appeal affirmed the judgment of conviction.

In 1996, Davis filed pro se petitions for a writ of habeas corpus in California Superior Court, the California Court of Appeal, and the California Supreme Court. In each, he raised claims of ineffective assistance of trial and appellate counsel. Each court denied Davis' petition. The California Supreme Court summarily denied Davis' final petition in May of 1996. In December of 1996, Davis filed a pro se petition for a writ of habeas corpus in federal district court. In his federal petition, Davis again raised claims of ineffective assistance of trial and appellate counsel. He also argued, *inter alia*, that the evidence was insufficient to support his conviction, and that the trial court erred by failing to instruct the jury on the lesser included offense of trespass.

The district court granted Davis a writ. The court held that Davis had been denied the effective assistance of appellate counsel because that counsel's submission of a "*Wende*" brief, which raised no issues for appeal and pointed to no part of the record that might warrant such an appeal, failed to satisfy the federal constitutional standards enunciated in *Anders* and *Penson v. Ohio*, 488 U.S. 75 (1988). It then denied all of Davis' remaining claims.

II.

The state's primary argument in this appeal is that the district court's decision does not comport with the requirements of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). AEDPA wrought a number of changes in the statute governing habeas corpus proceedings by persons convicted of state offenses. Under § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

The state contends that the district court's decision was not supported by clearly established federal law, as determined by the United States Supreme Court, and was therefore improper. We reject the state's argument.[1]

[1]The district court noted that Davis' petition was subject to the requirements of § 2254(d). The court correctly held that "under AEDPA, the petition may not be granted . . . unless the state court's adjudication of the claim: '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.' "

In *Anders*, 386 U.S. at 739, the defendant had been convicted of felony possession of marijuana. On appeal, Anders' court-appointed counsel concluded that any appeal would lack merit and so notified the court in a letter brief. Other than informing him of his right to file a pro se brief, Anders' counsel failed to do anything else on his behalf. *See id.* at 739-40.

The Court delineated a court-appointed appellate counsel's duty to represent his client after "determin[ing] that there is no merit to the indigent's appeal." It began its analysis by reaffirming indigent defendants' right to counsel on appeal. The Court noted that it had "consistently held invalid those procedures 'where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.' " *Id.* at 741 (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). It then wrote that this "constitutional requirement of substantial equality and fair process" is only realized where the court-appointed counsel "acts in the role of an active advocate in behalf of his client." *Anders*, 386 U.S. at 744. In no uncertain terms, the court held that when appellate counsel simply submits a "no-merit letter," such as the one submitted by Anders' appellate counsel, he does not fulfill his constitutionally mandated responsibility to act in the "role of an active advocate." The court held that the submission of a no-merit letter is simply not "an adequate substitute for the right to full appellate review." *Id.* at 742 (*quoting Eskridge v. Washington State Bd.*, 357 U.S. 214, 215 (1958)).

The *Anders* Court then explained the procedure, required by the constitution, that an appellate counsel *must* follow if he determines that an appeal would be frivolous:

> [I]f counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw.

> That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal . . . .

Anders, 386 U.S. at 744.

Significantly, *Anders* goes on to hold that when an appellate attorney fails to comply with these constitutional standards, and merely files a no-merit brief of the sort filed on behalf of Anders, the defendant is deprived of his right to counsel on appeal. *See id.* at 745. In the Court's words, where counsel files a no-merit brief that does not comport with these standards, the defendant is left to "shift *entirely* for himself." *Id.* (emphasis added).

In *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), we applied *Anders* to a case factually indistinguishable in all relevant respects from the case at bar. Although *Robbins* was a pre-AEDPA case, because our decision there was simply an application of *Anders*, *Robbins*' reasoning is equally applicable in AEDPA cases.

In *Robbins*, defendant's appellate counsel filed a "no-merit brief" pursuant to *People v. Wende*, 600 P.2d at 1074. *Robbins*, 152 F.3d at 1064. The brief filed in *Robbins* was indistinguishable from the brief filed by Davis' appellate counsel here: it "briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues." *Id.* As here, Robbins filed an appellate brief on his own behalf, but his

appeal was unsuccessful. As here, the district court granted Robbins' petition for a writ of habeas corpus, holding that Robbins' appellate counsel had failed to satisfy the requirements established in *Anders*.

The state argued in *Robbins*, as it does here, that because the no-merit brief complied with the standards enunciated by the California Supreme Court in *Wende*, the district court erred in determining that the brief was insufficient under *Anders*. *Robbins*, 152 F.3d at 1066.[2] The *Robbins* court expressly rejected the state's argument. *Id.* at 1066-67. Relying on "the United States Supreme Court's requirements set forth in *Anders*," the court held that, despite the fact that the no-merit brief complied with *Wende*, the requirements of *Anders* "were not met." *Id.* at 1067. As the court wrote:

> The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court 'independently review the entire record for arguable issues.' Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

Id.[3]

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[2]Under *Wende*, an appellate attorney may file a brief that merely "set[s] forth a summary of the proceedings and facts with citations to the transcript, raise[s] no specific issues, and call[s] upon the court to make a thorough review of the record to determine for itself whether there were any arguable issues." 600 P.2d at 1074. The nonexistence of arguable issues, moreover, may be inferred from counsel's failure to raise any, and counsel need not withdraw unless he explicitly describes the defendant's case as "frivolous." *Id.* at 1075.

[3]In *United States v. Griffey*, 895 F.2d 561, 562 (9th Cir. 1990), we held similarly that a brief, which satisfied the requirements of *Wende*, failed to comport with the constitutional requirements of *Anders*. The brief at issue in *Griffey* was, again, indistinguishable from the brief filed by Davis'

There would be no question that the case at bar is controlled by *Robbins* if this were a pre-AEDPA case. Again, the no-merit brief filed by Davis' appellate counsel is indistinguishable from the brief at issue in *Robbins*: both briefly summarized the procedural and factual histories of the cases, and requested that the state appellate court independently review the entire record for arguable issues. It is equally obvious, however, that in *Robbins* we were applying "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d), namely *Anders v. California*. *Robbins* was, in fact, *nothing more* than an application of *Anders* to facts indistinguishable from those presented here. In reaching its holding, the *Robbins* court wrote that "[o]ur obligation . . . is to determine whether appellate counsel met his obligations *under the United States Supreme Court's requirements set forth in Anders* and its progeny." *Robbins*, 15_ F.3d at 1066-67 (emphasis added). The court's conclusion was that although a *Wende* brief had been filed, "the district court correctly found that *Robbins's counsel did not comply with Anders*." *Id.* at 1067 (emphasis added). Finally, the court concluded that "the outcome of Robbins's case was *predetermined* by the controlling analysis provided by the Supreme Court in *Anders* . . . ." *Id.* at 1068 (emphasis added).

[1] As *Robbins* makes clear, *Anders* clearly establishes that

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counsel. The *Griffey* brief: "summarized the proceedings in the district court, recited the facts of the case, and stated that counsel had reviewed the record and 'located no specific issues' for appeal." *Id.* As here, counsel in *Griffey* "did not say the appeals were frivolous and did not move to withdraw," but asked the court to review the record. *Id.* Our holding in *Griffey* that the brief was inadequate was based entirely on Supreme Court precedent, namely *Anders*. Because, as *Anders* dictates, a brief must refer "to anything in the record that might arguably support the record," we held in *Griffey* that an attorney who files a *Wende* brief that fails to do so fails to fulfill his role as advocate, and leaves the defendant to "shift entirely for himself." *See id.* (*quoting Anders*, 386 U.S. at 744).

a no-merit brief such as the one filed by Davis' appellate attorney does not satisfy federal constitutional standards. Here, the state court decision we review is "contrary to . . . clearly established Federal law, as determined by the Supreme Court." As in *Anders*, Davis' counsel left Davis to "shift entirely for himself," and thereby failed to fulfill the "role of an active advocate" required by the constitution. *Anders*, 386 U.S. at 745, 744. Under *Anders*, Davis is entitled to a fresh appeal. The California court's denial of Davis' writ on his claim of ineffective assistance of appellate counsel is contrary to *Anders* and, in this regard, the District Court's decision comports with AEDPA.[4]

III.

The state next argues that the district court erred in granting petitioner a writ without determining that Davis was prejudiced by his appellate counsel's performance.[5] In *Penson v. Ohio*, 488 U.S. 75 (1988), the Supreme Court considered the question whether a petitioner who suffers ineffective assistance under *Anders* must also show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). In *Penson*, petitioner's appellate counsel, like Davis' appellate counsel here, filed a no-merit brief. 488 U.S. at 77-78. The attorney then

[4]In *Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997), the court held that *Faretta v. California*, 422 U.S. 806 (1975) "clearly established" a rule of law regarding the timeliness of a request for self-representation. In dicta, the *Moore* court suggested that the timeliness rule was "necessary to the [*Faretta*] Court's decision, and therefore is a holding of the Court." *Moore*, 108 F.3d at 265. *Moore* does not establish a requirement that a rule be "necessary" to a Supreme Court "holding" in order to clearly establish Federal law. It merely points out that such was the case with respect to *Faretta*.

[5]In its brief, the state also argues that the district court failed to determine whether counsel was "incompetent." By failing to comply with the requirements of *Anders*, counsel's performance failed to comport with constitutional standards. *See Anders*, 386 U.S. at 738. No separate *Strickland* competence analysis is called for when counsel fails to comply with *Anders*.

requested, and was granted, leave to withdraw from the case. As the Court wrote, "counsel was permitted to withdraw before the court reviewed the record on nothing more than a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief." *Id.* at 78. The state court subsequently granted petitioner 30 days in which to file an appellate brief pro se, but denied petitioner's request for the appointment of a new attorney. *See id.* The state court of appeals affirmed petitioner's conviction.[6]

The *Penson* Court first reiterated the holding of *Anders*, that "a criminal appellant may not be denied representation on appeal based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Id.* at 80. It then held that "[c]ounsel's failure to file such a brief left the Ohio court without an adequate basis for determining that he had performed his duty carefully to search the case for arguable error and also deprived the court of the assistance of an advocate in its own review of the cold record on appeal." *Id.* at 82. The state in *Penson*, argued, however, that even if the court had erred in granting appellate counsel's motion to withdraw and in failing to appoint new counsel, petitioner failed to show prejudice under *Strickland* and therefore the state court's affirmance of Penson's conviction was not in error.

The *Penson* Court completely rejected the claim that a showing of prejudice was required. As the Court wrote, requiring a showing of prejudice in cases such as this:

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[6]The court actually reversed petitioner's conviction on one count, on the ground that the trial court had given an erroneous jury instruction. *See Penson*, 488 U.S. at 79. It affirmed on all other counts noting that the petitioner had " 'suffered no prejudice' as a result of 'counsel's failure to give a more conscientious examination of the record' because the court had thoroughly examined the record and had received the benefit of arguments advanced by counsel for petitioner's two codefendants." *Id.*

> would leave indigent criminal appellants without any of the protections afforded by *Anders*. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protections afforded by *Douglas* and *Anders*.

488 U.S. at 86.

The state argues that *Penson* cannot control this case because in *Penson*, unlike in the case before us, the appellate counsel formally withdrew. According to the state, unless appellate counsel formally withdraws, the defendant is not "without representation," *id.* at 88, and thus it is inappropriate to apply *Penson*'s rule of presumed prejudice. We conclude, however, that while there is indeed a difference between *Penson* and the present case, a failure to apply *Penson* here would amount to an "unreasonable application of" clearly established federal law for purposes of 28 U.S.C. § 2254(d).

To date, we have not defined the term "unreasonable application" as used in § 2254(d), nor have we explained the difference between "contrary to" and "unreasonable application of," as used in that section. Clearly, however, both terms reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court. Moreover, as some other circuits have correctly pointed out, the statutory terms are not amenable to a rigid distinction, *see, e.g., O'Brien v. DuBois*, 145 F.3d 16, 22 (1st Cir. 1998), and

have "overlapping meanings." *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998).

The two terms, read together, delineate the range of cases that warrant federal habeas relief under § 2254(d)(1). The terms overlap, and cases may fall into one or both classifications, depending on the circumstances. No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other. Their purpose is the same: to ensure the objective that state courts follow controlling Supreme Court law.[7] For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.[8]

[2] It is true, as the state points out, that in *Penson* the appellate counsel formally withdrew from representing the petitioner, while in this case Davis' appellate counsel did not formally withdraw. *Anders*, 386 U.S. at 745. The legal princi-

[7]In a footnote in *Moore v. Calderon*, 108 F.3d 261, 265 n.3 (9th Cir. 1997), we stated in dicta that the "contrary to" test applies to questions of law, while the "unreasonable application" test applies to mixed questions of fact and law. While this is certainly true in some instances, in the *Moore* footnote we did not attempt a complete definition of these statutory terms, or set forth an inflexible rule. Nor do we here. We leave the terms with the full flexibility and potential for interchange with which we found them.

[8]The definition we offer here is not intended to be exhaustive. Rather, it sets forth certain circumstances in which a state court's determination amounts to an "unreasonable application." There are, of course, other circumstances comprehended by the term we construe. If, for example, a state court applies a Supreme Court precedent in a context where such application is unreasonable, the decision would amount to an unreasonable application. So too would a state court decision that, in applying federal law, simply misinterprets the relevant Supreme Court precedent. *See, e.g., Green*, 143 F.3d at 870.

ples established in *Anders* and *Penson*, however, extend to cases in which appellate counsel does not formally withdraw. As noted, the *Anders* Court established the rule that when an appellate counsel files a "no-merit" brief that fails to comport with the standards enunciated in that case, he fails to fulfill his "role as advocate," and thereby leaves the defendant to "shift *entirely* for himself." *Id.* at 744, 745 (emphasis added). Therefore, it is the appellate counsel's failure to conform with *Anders*, irrespective of counsel's decision to formally withdraw from a case, that leaves the defendant "entirely" to his own devices, and entirely without representation. It is also obvious that a defendant left to "shift entirely for himself" is a defendant left, in the words of the *Penson* Court, "completely without representation during the appellate court's actual decisional process." *Penson*, 488 U.S. at 88. Accordingly, in a case where the defendant's appellate attorney does not formally withdraw but fails, nonetheless, to comport with the requirements of *Anders*, the defendant is "completely without representation" and *Penson*'s rule of presumed prejudice must be applied. A failure to apply the rule of presumed prejudice simply because the attorney has not formally withdrawn is a failure to apply the "principle of a precedent in a context where such failure is unreasonable." *Green*, 143 F.3d at 871. It therefore amounts to an "unreasonable application of" clearly established federal law, as determined by the Supreme Court.

This reading of *Penson*'s reach is supported by another circuit. In *Lofton v. Whitley*, 905 F.2d 885 (5th Cir. 1990), the Fifth Circuit considered whether *Penson*'s rule of presumed prejudice extended to a situation where, as here, the appellate counsel had filed a deficient no-merit brief, but had not formally withdrawn from the case. As the Fifth Circuit wrote, "that counsel did not formally withdraw does not appear to be a significant distinction that would change the analysis from the presumed prejudice of *Penson* . . . . Lofton may have been formally represented by counsel, but the *failure to raise any grounds for appeal was the equivalent of his attorney's*

withdrawal." *Id.* at 888 (emphasis added). This part of the court's opinion was based entirely on *Penson* and *Anders*. Accordingly, as the Fifth Circuit confirms, even where an attorney does not formally withdraw from the case, *Anders* and *Penson* dictate that the attorney's failure to comply with the requirements of *Anders* results in the deprivation of the defendant's right to counsel. *See Anders*, 386 U.S. at 745; *Penson*, 488 U.S. at 83-85. Again, it is an unreasonable application of clearly established Supreme Court law not to extend *Penson*'s rule of presumed prejudice to this circumstance.[9]

IV.

In granting Davis' writ on his claim of ineffective assistance of appellate counsel, the district court held that Davis had raised at least three arguable underlying claims: ineffective assistance of trial counsel, insufficiency of the evidence, and jury instruction error. Because the underlying claims were arguable, the district court held that Davis' appellate counsel should have raised them on direct appeal. The district court

[9]That the failure to apply a rule of presumed prejudice in this case is an "unreasonable application of" federal law is also evident from the Supreme Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic*, decided the same day as *Strickland*, the Supreme Court enunciated conditions where *Strickland*'s prejudice requirement does not apply. The Court held that there are circumstances "that are so likely to prejudice the accused" that prejudice should be presumed. *Id.* at 658. In enumerating these circumstances, the Court wrote that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659. Significantly, *Cronic* cited *Anders* for the proposition that "the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' " *Id.* at 656 (*quoting Anders*, 386 U.S. at 743). As we know from *Anders*, when a counsel files a no-merit brief that fails to comport with the standards enunciated there, the counsel fails to act "in the role of an advocate." Accordingly, *Cronic*, like *Penson*, dictates a rule of presumed prejudice in cases such as the one at bar. Failure to apply that rule amounts to an "unreasonable application of" federal law.

also conducted its own review of these same underlying claims and, under the standards enunciated in 28 U.S.C. § 2254(d), held that Davis did not "establish his entitlement to federal habeas relief" on any of them. The state argues that because the district court denied Davis' petition on the underlying claims, Davis cannot "vindicate" any federal right by returning to the state court for a fresh appeal. The state argues, in essence, that because the district court denied Davis federal habeas relief on his underlying claims, Davis should be estopped from trying to litigate these claims in a state court appeal.

[3] The state's argument is erroneous. The district court's denial of Davis' petition on his underlying claim indicates nothing more than the district court's conclusion that the state court's rejection of those claims was not contrary to federal law as established by the United States Supreme Court. In a direct appeal, the state court would apply an entirely different standard of review to Davis' claims. For this reason, regardless of the district court's ruling as to whether any of these alleged violations entitled him to habeas relief, Davis indeed may vindicate his federal rights by returning to the state court for a fresh appeal.[10]

[4] Moreover, the state's argument, if accepted, would serve to import a prejudice requirement through the back door. The state asks this court to hold that Davis is not entitled to relief on his *Anders* claim because, it believes, his appeal will not succeed. As stated above, where a defendant suffers a violation of *Anders*, he need not show prejudice. He certainly need not show that he will prevail on appeal. *See,*

[10]A heightened standard of harmless error analysis, moreover, applies in federal habeas corpus proceedings. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619 (1993). Under *Brecht*, in a federal habeas proceeding "the standard for determining whether habeas relief must be granted is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 623 (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

e.g., *Penson*, 488 U.S. at 86. Because Davis' appellate counsel failed to comply with the constitutional requirements of *Anders*, Davis is entitled to a fresh state court appeal, irrespective of the district court's resolution of his federal habeas claim. By affording Davis this appeal, his federal right to effective assistance of counsel, enunciated in *Anders*, will be vindicated.

V.

The district court's order granting Davis a writ on the issue of ineffective assistance of appellate counsel is therefore AFFIRMED.